DEC 20 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-70

LEWIS H. GOLDFARB and RUTH S. GOLDFARB, individually and as Representatives of the Class of Reston, Virginia Homeowners,

Petitioners,

v.

VIRGINIA STATE BAR and
FAIRFAX COUNTY BAR ASSOCIATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court and its findings of fact are reported at 355 F. Supp. 491, and set forth at pages 1-15 of Appendix A to the petition for a writ of *certiorari*.[1] The Stipulation of Facts agreed to by the parties is not officially reported but is set forth at pages 16-20 of

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[1] References to the appendices accompanying the petition will designate the particular appendix and the page in it, and will be in this form "App. ___, p. ___." References to the Single Appendix will have the page preceded by "A."

that Appendix. The opinion of the Court of Appeals is reported at 497 F.2d 1, and set forth as Appendix B to the petition.

JURISDICTION

The judgments of the Court of Appeals were entered on May 8, 1974. The petition for a writ of *certiorari* was filed on August 5, 1974, and was granted on October 29, 1974, with Mr. Justice Powell taking no part in the consideration or decision of the matter. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Are bar associations which promulgate a minimum fee schedule exempt from the price fixing prohibitions of the antitrust laws because the restraint on competition is among the members of a "learned profession"?

2. Does a restraint of trade by attorneys in the fixing of fees for title examinations in connection with obtaining mortgages on real estate in Northern Virginia, substantially restrain commerce among the several States, where the undisputed evidence shows that a substantial portion of these mortgages involve (a) loans made from persons outside of Virginia, and/or (b) guarantees by agencies of the Federal Government headquartered in Washington, D.C., and/or (c) the purchase of a home by a non-resident of Virginia?

3. Is the Virginia State Bar exempt from the antitrust laws under the doctrine of *Parker v. Brown* for its role in a price fixing arrangement utilizing minimum fee schedules even though there is no statute authorizing the promulga-

tion of such schedules, and where the only independent state agency involved, the Virginia Supreme Court, did not approve either the fee schedules themselves, the reports of the State Bar which led to their adoption, or the opinions of the State Bar which provided the enforcement mechanism for obtaining adherence to such schedules?

STATUTES INVOLVED

The principal statute involved, the Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

The relevant statutes of the Commonwealth of Virginia are set forth in Addendum A to this brief.

STATEMENT

A. FACTS

On October 26, 1971, the named plaintiffs in this action, Lewis H. and Ruth S. Goldfarb, contracted to purchase a $54,500 home in Reston, Virginia. The contract provided that the closing would take place at the offices of A. Burke Hertz, a Virginia attorney, who maintained his office in Falls Church which, like Reston, is in Fairfax County (App. A, p. 16).

As a condition of obtaining a mortgage for their home, the Goldfarbs were required to obtain title insurance to

cover the mortgagee's interest (Exhibit 32, ¶15, sec. 7).[2] Under ethical opinions issued by the Virginia State Bar, the giving of an opinion as to the state of a title to real property cannot be done by a title insurance company but must be done by a private attorney.[3] Therefore, on November 23, 1971, the Goldfarbs wrote Mr. Hertz concerning the possible utilization of his services to perform the required title examination, as well as for other matters relating to the purchase of their home (Exhibit 2). Their letter indicated a desire to minimize the cost of obtaining title insurance and noted that their realtor had estimated that an attorney would charge them approximately $522 for the title examination alone, the amount as determined by the fee schedule of the local bar associations. On December 8, 1971, Mr. Hertz replied, indicating that it was "the policy of this office to keep our charges in line with the minimum fee schedule of the local Bar Association" (Exhibit 3).

Thereafter, the Goldfarbs sent letters to 36 other attorneys in Northern Virginia to inquire about fees for title examination services (Stip. ¶6, App. A, p. 17). Nineteen written replies were received (Exhibits 6-24), all of them indicating adherence to the fee schedule not only by the responding attorney, but by other members of the bar as well. For example, one stated that attorneys are "not permitted to actively solicit legal business, and any attorney who would reduce his fee for title examination in

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[2] References to Exhibits are to the Exhibits admitted in evidence, with numbers 1-32 having been admitted by stipulation. References to Exhibits, which are reproduced in the Single Appendix, will include the appropriate pages in that document.

[3] See Unauthorized Practice of Law Opinion No. 17, August 5, 1942, Virginia State Bar – Opinions 239 (1965 ed.)

order to obtain your business would, in my opinion, run afoul of the 'no-solicitation' rule" (Exhibit 6). The same attorney also indicated that he knew of "no attorney who charges less than the recommended fee schedule for title examinations" and that his title examination fees followed the recommended fee scale adopted by the bar association. Another attorney phrased his reply this way:

> The Fairfax County Bar Association has established a minimum fee schedule which in effect establishes the fees charged for title examination in Fairfax County.
>
> * * *
>
> My fee for title examination would be the same as those figures quoted you. I feel I am ethically required to adhere to the fee schedule of the Fairfax County Bar due to the lack of any special relationship, this should be true for any other attorney [sic] (Exhibit 9).

Other references were to the "standard Bar rate" (Exhibit 8) and to the fact that "all attorneys in this area use the minimum fee schedule in real estate settlement cases" (Exhibit 11), and that fees are "determined by a minimum fee schedule" (Exhibit 18). Other replies (Exhibits 10, 13, 14, 15, 16, 21, and 24) demonstrated adherence by that attorney and all others in the area to the fees set forth in the minimum fee schedule. In short, Mr. Hertz's prices were no better and no worse than any other attorney who replied.

Therefore, at the January 15, 1972, closing on their house, the Goldfarbs utilized the services of Mr. Hertz and were charged $522.50 for a title examination – precisely the amount calculated under the minimum fee schedule –

plus $196 for the title insurance itself. In addition, they paid Mr. Hertz $25 for preparation of title insurance documents, $30 for a deed of trust and a note, $30 for the deed, and $30 for a closing fee (Exhibit 25). All of these charges were also the exact amounts set forth on the minimum fee schedule (Exhibit 29, pp. 26-27, A. 41-42). Thus, by virtue of the minimum fee schedule, Mr. Hertz received $637.50 from the Goldfarbs for services relating to the purchase of their home.

The minimum fee schedule referred to by these attorneys was promulgated in 1969 by the respondent Fairfax County Bar Association in conjunction with the bar associations of Loudoun and Arlington counties and the City of Alexandria (Exhibit 29, A. 37-44). For title examinations, the minimum fee is 1% of the first $50,000 of the loan or purchase price, whichever is greater, one-half of one percent from $50,000 to $100,000, one-quarter of one percent between $100,000 and $1,000,000 and a negotiated amount thereafter (Exhibit 29, p. 25, A. 40).

The requirement of adherence to these minimum fee schedules is imposed by the Virginia State Bar. The State Bar, which was created by the Virginia Supreme Court pursuant to statutory authority,[4] is an integrated bar, meaning that every attorney licensed to practice in Virginia must be a member of it and pay annual dues to it (Stip. ¶¶ 9 and 11, App. A, pp. 17-18). Pursuant to § 54-52 of the Virginia

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[4] Virginia Code § 54-49 (1972 Repl. Vol.). After the trial in this action, the provisions of the Virginia Code relating to the Bar were amended in certain minor respects, none of which is relevant to this case. Accordingly, we will refer to the statutes as in effect in 1972, which is the version set forth in Addendum A to this brief.

Code, the money used to operate the State Bar is appropriated from a special fund in the State Treasury by act of the General Assembly. This special fund consists entirely of dues paid by members of the State Bar in accordance with a schedule which the Supreme Court establishes pursuant to its statutory authority to do so, Virginia Code § 54-50 (Stip. ¶ 12, App. A, p. 18). In contrast, the local bar associations, which actually publish the fee schedules, are purely voluntary organizations of attorneys who practice in a particular locality (Stip. ¶ 13, App. A, p. 18).

The Supreme Court of Virginia has promulgated rules and regulations governing the conduct of attorneys and the operation of the State Bar. The State Bar is required by statute and court rule to investigate alleged violations of these standards of conduct and to report its findings to a court of appropriate jurisdiction which undertakes any disciplinary proceedings (Stip. ¶ 11, App. A, p. 18). Relying upon the authority given to it by the Virginia Supreme Court to issue opinions on questions of ethics, the State Bar has issued Opinions 98 and 170 (Exhibits 30 and 31, A. 45-48) which, in substance, state that it is unethical for an attorney habitually to charge fees below those suggested in a minimum fee schedule, and that sanctions may be imposed by the State Bar against an attorney who violates that ethical proscription. Thus, the threat of sanctions for a violation of Opinions 98 and 170 stands behind the minimum fee schedules promulgated by the local bar associations.

In addition, the State Bar issued reports on the subject of minimum fee schedules in 1962 and 1969 (Exhibits

26 and 27, A. 19-28).[5] Those reports included suggested local fee schedules that were the basis for the minimum fee schedules adopted and published by the local bar associations. In fact, the suggested fees for title examination adopted by the Fairfax County Bar Association in both 1962 and 1969 (Exhibits 28 and 29, A. 29-44) were virtually identical to those suggested in the State Bar Reports.

Two further facts concerning the role of the Virginia Supreme Court with regard to minimum fee schedules are important in this action. First, the statutes which give that Court the authority to organize and regulate the State Bar are general in nature and make no mention whatsoever of minimum fee schedules or of controlling the pricing decisions of individual attorneys (see Addendum A to this brief). In fact, the only possible relevant statute among them is section 54-51, but that specifically limits the power of the Virginia Supreme Court to adopt ethical rules or regulations to those which are not "inconsistent with any statute. . . ." Second, the Virginia Supreme Court has never held a formal or even informal proceeding of any kind with respect to the lawfulness of fee schedules under Virginia or federal law, nor do the Virginia statutes provide for any such proceeding. Thus, it has never specifically passed on the 1962 and 1969 Fee Reports of the State Bar, the 1962 and 1969 minimum fee schedules issued by the local bar associations as recommended in those Reports, or Opinions 98 and 170 which provide the means of securing adherence

[5] The 1962 Fee Report was prepared by the Bar's Committee on Economics of Law Practice. In 1969 the work was done by the Committee on Professional Efficiency and Economic Research, which described itself as a "similar committee" to the one which issued the 1962 Report (Exhibit 27, p. 3, A. 25).

to the local fee schedules. The sole references to minimum fee schedules in any rule or regulation issued by the Virginia Court are in Canon 12 of the now-repealed Canons of Professional Ethics, 171 Va. *xvii, xxiii,* adopted October 21, 1938, and Ethical Consideration 2-18 of the current Code of Professional Responsibility, 211 Va. 295, 302, adopted October 13, 1970, effective January 1, 1971. In discussing the question of an appropriate fee, the Canon states that one relevant factor is " . . . the customary charges of the Bar for similar services," and then goes on to note that in determining such charges ". . . it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association . . ." (App. A, p. 9). The Ethical Consideration simply states that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." *Id.* In both instances these provisions were adopted verbatim from the Canons/Code prepared by the American Bar Association and adopted by it on July 9, 1924, and August 12, 1969, respectively.

B. PROCEEDINGS IN THE DISTRICT COURT

On February 22, 1972, the Goldfarbs filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, on behalf of themselves and a class of persons who had purchased homes in Reston, Virginia, during the four-year period preceding the filing of the complaint, and who had been unlawfully charged title examination fees in accordance with the minimum fee schedule. Named as defendants in this action were the Virginia State Bar and the bar associations of Fairfax and Arlington counties and the City of Alexandria (A. 5-16).

The complaint alleged that the defendants had violated the Sherman Antitrust Act, 15 U.S.C. §1, by the operation of the minimum fee schedule system, under which adherence by attorneys to the schedule promulgated by the local bar associations was compelled by the State Bar. The State Bar's compulsion was brought about by its issuance of Opinions 98 and 170, which, in effect, threatened attorneys with disciplinary proceedings if they did not follow the fee schedule. In addition, the complaint alleged that the issuing of the 1962 and 1969 State Bar Reports, which led to the promulgation of the virtually identical local bar association minimum fee schedules, also made the State Bar a co-conspirator. Petitioners contended that, as a result of the minimum fee schedule system, the members of the plaintiff class had been overcharged for title examinations in connection with the purchase of their homes. The complaint asked for treble damages, as well as declaratory and injunctive relief against the continued operation of the minimum fee schedule system.

After discovery was conducted, a pre-trial conference was held at which it was agreed to sever the trial on liability from that on damages. On September 28, 1972, the District Court, without objection by the respondents, certified this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and, after extensive oral argument, denied the motions of the defendants for summary judgment. (A. 2).[6] Thereafter, petitioners entered into a settlement with the defendants Alexandria Bar Association and Arlington County Bar Association, under which those two associations agreed to withdraw their fee schedules, to advise their members of the withdrawal, and to refrain from publishing any minimum or suggested fee schedules

[6] Petitioners sent individual notice to the approximately 2400 members of the plaintiff class, and additional notice by publication in the *Reston Times* was also given.

in the future, in exchange for which all damage claims against the two associations were dismissed with prejudice. On December 11, 1972, after notice to the members of the plaintiff class had been sent, the District Court held a hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and approved the settlement. Two days later the trial was held.

The trial took less than half a day because the bulk of the facts had been agreed upon by stipulation of the parties. The defendants renewed their contentions previously made by motion that there was no liability on their part because (1) there was an insufficient connection between the activities of defendants and interstate commerce, (2) lawyers, as members of a learned profession, were exempt from the Sherman Act, and (3) their actions were those of the State and hence immune under *Parker v. Brown,* 317 U.S. 341 (1943). In addition, the Fairfax Bar argued that the minimum fee schedule system did not violate the antitrust laws and that petitioners were not damaged by that system. Following the submission of proposed findings of fact, conclusions of law, and post-trial memoranda, the District Court issued its memorandum opinion and made findings of fact (App. A). It ruled that the defendant Fairfax County Bar Association had violated the antitrust laws and was liable for damages to the members of the plaintiff class, but found on *Parker v. Brown* grounds that the State Bar was not liable, although it had previously rejected that defense when it was raised in a motion for summary judgment.

The Court first ruled that the operation of the minimum fee schedule system was "a form of price fixing and therefore inconsistent with antitrust statutes prohibiting anti-competitive activities." (App. A, p. 3). It specifically declined to create an exemption for the pricing practices of attorneys, noting that "fee setting is the least 'learned' part of

the profession" (App. A, p. 5). From the evidence which showed that the rates charged for title examinations were not in most cases based on factors other than the minimum fee schedule, and from the evidence concerning the efforts of the Goldfarbs to obtain legal services at rates below the fee schedule amounts, the Court concluded that there was significant adherence to the fee schedule (Findings 6-8, App. A, p. 8), which resulted in damage to the Goldfarbs (App. A, p. 4).[7]

As for the commerce issue, the trial judge concluded that, with respect to real estate transactions in Northern Virginia, and particularly in Fairfax County, a significant amount of interstate commerce was affected by the use of these schedules. Based upon what the Court considered to be "a fair sampling of loans made on real estate in Fairfax County" (App. A, p. 4), it found that more than half of the money loaned came from out-of-state sources. Plaintiffs' witness, a retired Army Colonel and a member of the Virginia Bar, had examined one of every ten chronological deed books for the years 1970 and 1971 for Fairfax County. This examination showed that for this sample alone more than $75,600,000 of the $136,281,121 in loans came from out-of-state, with the source of $12.8 million not determinable from the deed books (Finding 2, App. A, p. 7).[8] In addition, the Court relied on the fact that millions of dollars of loans guaranteed by the United States Veterans Administration and United States Department of Housing and Urban Development, both of which

[7] The District Court specifically declined to make a finding as to the amount of damages sustained since that question had been severed from the trial on liability (App. A, p. 3, note 4).

[8] Because of the possibility that the larger deeds of trust were for commercial property, another computation was made eliminating all deeds of trust above $100,000. Of the approximately $77,000,000 that remained in the sample, the in-state and out-of-state were nearly equally divided *(id.)*.

were headquartered in the District of Columbia, had been made in the Northern Virginia area, with particularly large amounts for Fairfax County in the years 1968-72 (App. A, p. 4; Findings 3 & 4, App. A, p. 7). The Court also noted the large percentage of persons who live in Fairfax County but who work outside Virginia (App. A, p. 4), and found that substantial numbers of persons who had lived outside of Northern Virginia in 1965 had moved into Northern Virginia by the year 1970 (Finding 1, App. A, pp. 6-7). Accordingly, the Court concluded that the requirement of "commerce among the several states" in 15 U.S.C. §1 had been met.

The final defense raised was that defendants' conduct was immune under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). With respect to the defendant Fairfax County Bar Association, the Court rejected this argument, noting both the voluntary nature of the association and the fact that the group freely adopted the minimum fee schedule (App. A, pp. 5-6). The Court stated that the "fact that the State furnishes a vehicle for its enforcement upon complaint does not extend immunity to the local bar association" (App. A, p. 5).

The Court refused, however, to hold the State Bar liable for what the Court described as "its minor role in this matter" (App. A, p. 6). It found that the actions taken by the Bar were within the scope of its statutory or rule-created authority and hence were actions of the State and not those of private persons (*Id.*). It noted that there had never been any action taken by the State Bar to discipline an attorney for charging less than the minimum fee schedule and that, in view of the declaration of illegality of the fee schedule of the local bar association, any need for injunctive relief against the State Bar was removed (*Id.*).

As to petitioners' claim for damages, the District Court noted the stipulation that the State Bar is "an administrative agency of the Supreme Court of Virginia" (Stip. ¶ 9, App. A, p. 17) and stated that "such an agency was surely never intended to be included among those liable for damages under 15 U.S.C. § 15" (App. A, p. 6). Thus, without reaching the claim of the State Bar that the Eleventh Amendment to the United States Constitution precluded the maintenance of any damage action in federal court against the Bar, the District Court held that the State Bar was not liable for damages under the statute. Because the Court's opinion had made no specific determination of the lawfulness of the State Bar's promulgation in 1962 and 1969 of Fee Reports containing suggested fee schedules, petitioners moved pursuant to Rule 52(b) of the Federal Rules of Civil Procedure to amend the findings and to have the District Court deal specifically with that question. The Court denied that motion, indicating that the prior decision had implicit in it the rejection of plaintiffs' contention that the publishing of those Reports was in some way different from the issuance of Ethical Opinions. Thus, although the local bar associations could no longer publish fee schedules, the State Bar was left free to issue an updated "Report," with suggested fee schedules in it, that could resurrect the use of the same schedules, except that they would be issued by the State Bar and not the local bar associations.

In addition to petitioners' post-trial motion, the Fairfax County Bar Association also sought to amend the Court's opinion to make it prospective only, and thus to foreclose petitioners from recovering their damages. This contention, which was not contained in any pleading or any proposed finding of fact or conclusion of law, was rejected by the

Court at a hearing held on February 2, 1973, and again on February 28, 1973, based upon Fairfax's renewed motion for the same relief (A. 3-4). At that February 2nd hearing, the Court entered an order, the form of which had been agreed to by the parties, enjoining the further enforcement or use of Fairfax's minimum fee schedule. That order contained an appropriate direction pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and stayed all further proceedings in the District Court until the appeals of petitioners and the Fairfax County Bar Association could be decided by the Fourth Circuit (A. 17-18).

C. THE DECISION IN THE COURT OF APPEALS

The Court of Appeals, with Senior Circuit Judge Boreman writing for the majority, affirmed that part of the District Court's decision granting immunity to the State Bar, but reversed the judgment entered against the Fairfax County Bar Association, holding that the activities involved were immune under a "learned profession" exception to the antitrust laws and that there was an insufficient showing of an effect upon interstate commerce to sustain jurisdiction under the Sherman Act.

Initially, the majority discussed the applicability of the state action doctrine of *Parker v. Brown* to the State Bar. It correctly identified the three *Parker* requirements of a legislative command limiting competition, the presence of an agency of the State, and the vesting of authority for the final decision with that State agency rather than with a private person. With respect to the requirement of a "legislative command" to engage in the particular activities, the Court focused on section 54-48 of the Virginia Code, which authorizes the Virginia Supreme Court to promul-

gate rules and regulations defining the practice of law and prescribing a code of ethics and procedures for disciplining attorneys. The Court of Appeals observed that the "desired goal of the Code of Professional Responsibility is to benefit clients and the public in general. . ." and that it would be "manifestly unfair to dissect a state's regulatory program into its various component parts, parts that were meant to interrelate, and then to declare that because some factors may benefit those to be regulated, the program falls outside the *Parker* exemption" (App. B, p. 10). Based upon this analysis, the majority concluded that the Virginia Code "gave the Virginia Court the power to restrict competition among those in the legal profession" since it was the "Virginia legislature that created the machinery for regulation" (App. B, p. 12). The majority reached this conclusion despite the fact that there is not a word in any of the Virginia statutes which even mentions minimum fee schedules or restrictions on competition, much less which sanctions their use.

Turning to the second *Parker* condition – the presence of a state agency – the Court declined the invitation of the State Bar to rule that the Bar, which is comprised wholly of lawyers, could create antitrust immunity for itself by its approval of its own activities (App. B, p. 11). It did hold, however, that the Supreme Court of Virginia was sufficiently independent to provide the required State agency activity for purposes of *Parker v. Brown.*

As to the final requirement under *Parker,* the Court acknowledged that the Virginia Court must "*actively* supervise the State Bar" (App. B, p. 11, emphasis in original). It observed that the Virginia Court initially gave the authority to the State Bar to issue fee schedules and opinions similar to Opinions 98 and 170 concerning adherence to

such schedules, and that the Court officially adopted the Code of Professional Responsibility, which in discussing the proper method of setting fees mentions the use of local fee schedules (See App. A, p. 9). It also noted that the Virginia Court has employed suggested fee schedules in establishing attorney's fees in cases before it.

However, the most important aspect of the immunity determination was the Court's reliance on its earlier decision in *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Court there held that inaction by the state utility commission with regard to a proposal before it did not necessarily constitute a lack of active supervision required for immunity, on the theory that it is "just as sensible to infer that silence means consent, *i.e.* approval." *Id.* at 252. The majority below thereupon concluded that because the Virginia Court "has the authority to regulate and supervise the State Bar[,] we will not infer abandonment of that authority because of claimed inactivity. The active independent state supervision required in *Parker* is provided here by the Virginia court" (App. B, p. 11).

In his dissenting opinion, Judge Craven, who was the author of the *Washington Gas Light* opinion, observed that the Virginia Supreme Court "will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that the Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar" (App. B, p. 21, emphasis in original). Judge Craven, however, went on to exonerate the State Bar because of its "exceedingly 'minor role'" in this matter (App. B, p. 21). In his view,

the State bar did no more than suggest the adoption of minimum fee schedules by local bar associations and circulate reports on the schedules that were adopted.[9]

No member of the panel found that *Parker v. Brown* protected the Fairfax County Bar Association, and thus it was necessary to examine the other defenses since the court found it "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). The majority then determined that there is a limited exemption from the antitrust laws for the "learned professions," relying on two cases[10] which "hold" that one engaged in the practice of a profession does not follow a trade and that his activities are not the subject of commerce (App. B, p. 13 and notes 33 and 34). In explaining its ruling, it observed that the occupation of one who violates the Sherman Act is irrelevant, but that there must be a restraint upon trade or commerce (App. B, p. 15). The majority then stated that a restraint upon the interstate sale of health insurance would be unlawful,[11] but that "if a group of doctors con-

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9 In discussing the involvement of the State Bar, Judge Craven made no mention of the stipulated facts that the State Bar Reports were the basis of the local fee schedules and that the existence of Opinions 98 and 170 is a "substantial influencing factor" in the adherence by Virginia lawyers to such fee schedules (Stip. ¶¶15 & 20, App. A, pp. 18-19).

10 *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931); and *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). The Court also cited *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 573 (1944) (dissenting opinion of Chief Justice Stone).

11 Citing *American Medical Ass'n. v. United States*, 317 U.S. 519 (1943).

spire to restrain the practice of another doctor there is no Sherman Act violation because that which is restrained (*i.e.*, the practice of a learned profession, medicine) is neither trade nor commerce."[12] The Court of Appeals thereupon resolved the case before it as follows:

> With that distinction in mind, it should be clearly discernible that the impact of the Association's fee schedule in the instant case upon competition among attorneys for real estate work is not within the Sherman Act. *Id.*

The basis of this distinction was properly rejected by Judge Craven in his dissent (App. B, pp. 23-24), and its applicability to this case is difficult to support since the restraint is not on the legal profession but on the fee-setting practice of lawyers. Nonetheless, the majority observed that "where the restraint is upon the learned profession itself . . . the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15).

Although the holding on the "learned profession" issue would seem to have disposed of the case, the majority then proceeded to determine that petitioners also had not established a sufficient connection with interstate commerce

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12 App. B, p. 15, citing *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

to make the Sherman Act applicable.[13] The Court focused its attention on the allegations that the restraint occurred in connection with the financing and insuring of home mortgages by inflating a component part of the cost of securing housing. After reviewing the findings of the District Court, the majority concluded that the fact that persons involved in the purchase of these homes worked outside of Virginia is "totally irrelevant" (App. B, p. 16), even though those purchasing the services may have crossed state lines for the sole purpose of doing so. *Id.* citing *Elizabeth Hospital, Inc. v. Richardson,* 269 F.2d 167, 170 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959); *Spears Free Clinic & Hospital v. Cleere,* 197 F.2d 125 (10th Cir. 1952); and *Kallen v. Nexus Corp.,* 353 F. Supp. 33 (N.D. Ill. 1973). It further held that the act of a borrower in securing mortgage money from an out-of-state lender makes neither the selling of the house nor the supplying of incidental legal services, interstate activity (App. B, p. 17). It went on to observe that the "fact that those services are occasionally used by persons who simultaneously engaged in an ancillary interstate transaction to facilitate the conduct of that transaction is merely 'incidental' [and] does not justify Federal regulation of competitive restraints upon a business which is 'wholly local' in character" (App. B, p. 18).

Judge Craven, dissenting, pointed to the findings of the District Court regarding the millions of dollars of out-of-state funds loaned each year for Northern Virginia homes, the interstate guarantees by the Veterans Administration and the Department of Housing and Urban Development,

[13] The majority opinion contains a cryptic sentence which indicates that the learned profession discussion may have been merely *dicta*: "Since that which is allegedly restrained is not a learned profession, the 'learned profession' exemption does not apply here." (App. B, p. 15).

the travel and movement of persons into Northern Virginia, and the large percentage of persons who live in Fairfax County who work outside of Virginia. He concluded that the Northern Virginia housing market "cannot realistically be considered a purely local market" (App. B, p. 22). Relying on this Court's opinions in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219 (1948), and *United States v. Women's Sportswear Mfgs. Ass'n,* 336 U.S. 460 (1949), he concluded that the price-fixing agreement "has a sufficient impact on interstate commerce to come within the Sherman Act" (App. B, p. 22).

D. PROCEEDINGS IN THIS COURT

On August 5, 1974, petitioners filed their petition for a writ of *certiorari* on three questions: the applicability of *Parker-Brown* to the State Bar, the existence of a "learned profession" exemption, and the ruling that a substantial effect on interstate commerce had not been established. Short extensions of time to reply were allowed respondents, and on September 18, 1974, both the Fairfax County Bar Association and the Virginia State Bar filed their responses. The brief of Fairfax indicated that just two days previous to its filing, the Association had voted to rescind its minimum fee schedule and stated its intention not to issue any similar schedules in the future. In light of that development, Fairfax contended that injunctive relief was no longer required and that, since any decision in this case should be applied prospectively only, the controversy was moot. Its brief also urged that the decision of the Court of Appeals was correct on the "learned profession" and interstate commerce questions and that the Fairfax Bar was not subject to liability

because, contrary to the rulings of the Court of Appeals and the District Court, its activities were immune under *Parker v. Brown* and did not constitute price-fixing. The response of the State Bar was in the form of a Motion to Dismiss,[14] urging the correctness of the decision below under *Parker* and also asking this Court to rule that the Eleventh Amendment to the United States Constitution precluded this action insofar as it sought damages from the State Bar.[15]

On September 23, 1974, a motion to file a brief *amicus curiae* was filed by Professor Clark C. Havinghurst of Duke University Law School, urging this Court to grant the writ, and on October 18, 1974, the United States filed a brief *amicus curiae* also supporting the petition. The interest of the United States in this proceeding stems principally from its own case, *United States v. Oregon State Bar*, No. 74-362, (D. Ore.), which was filed the day after the decision in this case was handed down by the Fourth Circuit.

In light of the rescission of the Fairfax County Bar's fee schedule and its claim that the case was now moot,

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[14] But see Rule 24 (2) of this Court.

[15] The Motion is not explicit in limiting its applicability to the damage claim, but throughout these proceedings the Eleventh Amendment defense has been raised by the State Bar only with respect to the prayer for damages and not to the request for injunctive and declaratory relief. In addition, the Motion states (p. 8) that the judgment ". . . would have to be paid from the State Treasury . . ." but makes no mention of any similar problem with injunctive relief and in fact specifically recognizes the applicability of *Ex Parte Young*, 209 U.S. 123 (1907) (Motion, p. 6).

petitioners filed a response pursuant to Rule 24 (4) of this Court. That response pointed out the continuing need for injunctive relief against the State Bar because the Bar previously issued Fee Reports which became the basis of the local schedules and which could supplant them in the future if the State Bar's actions were held to be outside the scope of the antitrust laws. In addition, that response noted that a class of 2400 homeowners in Reston, Virginia had been certified and that their claims for damages could not be mooted by the rescission. Furthermore, as to the contention that relief should be prospective only, petitioners noted that the District Court had denied that application and that the Court of Appeals had not passed on it. Accordingly, we urged that no decision on that question should be made by this Court until the views of the Court of Appeals were received. It was with the case in this posture that this Court, on October 29, 1974, granted the petition and the motion of Professor Havinghurst to file a brief *amicus curiae.*[16] Thereafter, on November 11, 1974, this Court denied the Motion to Dismiss by the State Bar without opinion.

There has also been one further development in the case of *United States v. Oregon State Bar, supra.* The Oregon State Bar, which like respondent Virginia State Bar is an integrated bar, had moved to dismiss the complaint of the United States on the "learned profession" exemption and on *Parker v. Brown,* relying primarily on the opinion of the majority below in this case. On November 22, 1974, Judge Morell E. Sharp of the United States District Court

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[16] Professor Havinghurst has advised counsel for petitioners that he does not intend to file a further brief, but wishes to have his prior brief considered on the merits.

for the Western District of Washington, sitting by designation, denied the motion to dismiss in a careful and well-considered opinion which specifically rejected the analysis of the majority in the Fourth Circuit on both questions. A copy of that decision is appended as Addendum B to this brief.

In addition to the three questions on which *certiorari* was granted, the brief of respondent Fairfax County Bar Association in opposition to *certiorari* argued for non-liability on the grounds that *Parker v. Brown* applies to it, that minimum fee schedules are not a form of price fixing, and that any relief should be prospective only. The State Bar has also sought to interject its defense under the Eleventh Amendment in this Court. Neither respondent filed a cross-petition for *certiorari*, and hence for that reason alone those questions are not properly before this Court. See *Strunk v. United States,* 412 U.S. 434, 437 (1973) and *N.L.R.B. v. International Van Lines,* 409 U.S. 48, 52 n. 4 (1972).[17] Furthermore, the Fourth Circuit has not ruled on either the claim of prospectivity or the defense based on the Eleventh Amendment. In fact, the District Court has not even ruled on the Eleventh

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[17] As to the issues raised by Fairfax other than prospectivity, each of the judges in this case has found them to be without merit. Petitioners, accordingly, rely on the holdings of the lower courts with respect to those arguments. In addition, to the extent that this Court's refusal to consider questions not presented by cross-petitions for *certiorari* is discretionary, see R. L. Stern, *When to Cross-Appeal or Cross-Petition – Certainty or Confusion,* 87 Harv. L. Rev. 763, 777-779 (1974), neither the contention that *Parker v. Brown* applies to the Fairfax Bar nor the argument that minimum fee schedule are not a form of price-fixing, is a certworthy question.

Amendment question although it twice rejected the claim of Fairfax that relief should be prospective only (A 3, 4). In these circumstances, we respectfully suggest that it would be appropriate to have the Court of Appeals consider these questions prior to any ruling on them by this Court. See *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6 (1970).

SUMMARY OF ARGUMENT

In ruling that the minimum fee schedule system established and operated by respondents was outside the scope of the antitrust laws, the Court of Appeals significantly and erroneously narrowed the scope of the Sherman Act. The majority held that there was a "learned profession" exemption for the price fixing activities of attorneys, that petitioners failed as a matter of law to establish that the use of minimum fee schedules to set prices for title examinations to real estate in Northern Virginia had a substantial effect on interstate commerce, and that the actions of respondent Virginia State Bar were "state action", approved by the Virginia legislature and the Virginia Supreme Court, and hence immune under *Parker v. Brown,* 317 U.S. 341 (1943). The cumulative effect of these three rulings is to reverse the entire flow of antitrust decisions in this and the lower Courts and thereby to erect major roadblocks to antitrust enforcement.

In creating an across-the-board exemption for the price fixing activities of members of a "learned profession," the majority below based its decision upon opinions of this Court which it claimed held that such an exemption existed, whereas, as the dissent observed, those opinions contain no more than *dicta* on this question. Although the court below recognized that in *American Medical*

Ass'n v. United States, 317 U.S. 519 (1943), this Court had upheld a conspiracy conviction under the Sherman Act for the activities of doctors and their professional associations, it found a distinction between that case and the instant one which is unsupported either by the language in *AMA* or its facts. Moreover, to the extent that any such distinction exists, this case falls directly under the *AMA* decision, and the Court of Appeals was in error in reaching the contrary conclusion.

Besides its misreading of the relevant cases, the court below in creating an exemption for lawyers failed to take into account the extreme reluctance shown by this Court to read exemptions of any kind into the antitrust laws. It also failed to recognize that where broad exceptions have been created, *i.e.*, those for labor organizations and the insurance industry, they have resulted from Congressional rather than judicial action. Finally, to the extent that the authorities recognize any special treatment under the antitrust laws for the activities of members of a learned profession, the fee setting activities of respondents would not qualify.

On the interstate commerce issue, the Court of Appeals erroneously focused on the fact that the title examination took place entirely within Virginia, whereas this Court has repeatedly held that even wholly local transactions, such as the providing of opinions as to the state of the title to real estate, are within the Sherman Act if they are parts of larger transactions which are interstate in nature. Petitioners established in the District Court that the acquisition and financing of homes in the Northern Virginia area were transactions which had substantial interstate aspects to them, and, accordingly, that the restraints resulting from

the minimum fee schedules for title examination had a substantial effect on interstate commerce.

In making its determination of the commerce issue, the court below also failed to take into account that this Court has held that the Sherman Act is intended to cover all transactions which Congress could have included under its power to regulate commerce. *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 298 (1945). Therefore, a holding here that the requirements of interstate commerce have not been met necessarily determines that Congress could not constitutionally have brought these transactions under the Sherman Act even if it had specifically legislated in this area. Yet this Court's decisions in cases beginning with *Wickard v. Filburn,* 317 U.S. 111 (1942), and continuing through such Civil Rights Act cases as *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), have broadly interpreted the power of Congress under the Commerce Clause. Thus, because the opinion of the majority is inconsistent with these decisions, as well as those under the Sherman Act, it must be set aside.

The majority and dissenting judges on the Fourth Circuit panel found that the State Bar was properly dismissed by the District Court under the doctrine of state action set forth in *Parker v. Brown,* 317 U.S. 341 (1943). The majority concluded that the Virginia Supreme Court, acting pursuant to statutory directives from the Virginia legislature, had approved the State Bar's actions regarding minimum fee schedules and thus met the "active supervision" requirement of *Parker.* The dissenting judge chose an alternative ground for the State Bar's exemption – that the State Bar had played only a "minor role" in these matters.

The majority erred in failing to see that this case is factually distinguishable from *Parker* with respect to both of its requirements for obtaining an exemption. First, there is no legislative determination, translated into a detailed statutory directive, that the pricing policies of attorneys are to be regulated by the State, and not left to the free market, unfettered by restrictive arrangements of the kind involved here. The relevant Virginia statutes (Addendum A) do no more than permit the Virginia Supreme Court to regulate the conduct of attorneys and do not contemplate, let alone direct, a specific form of regulating the fee setting practices of members of the Virginia Bar.

Second, and independent of the first requirement, the Court below erroneously concluded that the Virginia Court had approved the actions of the State Bar. It did so by holding that silence on the part of the State Court was the equivalent of approval, a result which relied heavily on an earlier Fourth Circuit decision to the same effect, *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). That ruling is also inconsistent with *Parker* and its progeny, all of which outside the Fourth Circuit have required far more of the State agency than passive acquiescence in private decisions to restrict competition, before granting immunity from the antitrust laws. Since there was no meaningful form of alternate regulation by any agency of the State in this case, the Court was in error in granting a *Parker* exemption to the State Bar.

The lower Court's reading of *Parker* is at odds with this Court's refusal to imply exemptions in the analogous situation of an antitrust defendant seeking immunity based upon the presence of federal regulation in the field covering the alleged violation. This Court has held that immunity

is available "only to the extent necessary" to protect the aims of the regulatory statute. *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963). Given the reluctance of this Court to imply exemptions from the antitrust laws where Congressionally enacted federal regulatory statutes are involved, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) and the cases cited therein, there is no reason to assume that Congress intended to provide the States with greater leeway in overriding the antitrust laws where no substitute form of regulation is involved. Rather than narrowing the *Parker* exemption, the Court below impermissibly broadened it, and hence that portion of its decision must also be reversed.

Similarly, the determination of the dissenting judge – that the State Bar had played only a "minor role" and is thus immune from the antitrust laws – cannot be sustained. That ruling is erroneous because it was stipulated in the District Court that the presence of State Bar Opinions 98 and 170 was a "substantial influencing factor" in the adherence by the Bar to the local fee schedules (Stip. ¶20, App. A, p. 19). In addition, it was also stipulated that the State Bar's 1962 and 1969 Fee Reports were the "basis" of the local fee schedules (Stip. ¶15, App. A, p. 18), and in fact for real estate transactions, the State Bar's recommendations were adopted virtually verbatim by the Northern Virgina bar associations in both 1962 and 1969. On that record, there is no basis for a conclusion that the State Bar was a "minor" participant in these transactions.

ARGUMENT

I. THE PRICE FIXING ACTIVITIES OF RESPONDENTS ARE NOT EXEMPT FROM THE ANTITRUST LAWS MERELY BECAUSE THEIR MEMBERS EARN THEIR LIVINGS IN A "LEARNED PROFESSION".

There is no question that the minimum fee schedule system, with a charge of 1% of the purchase price for a title examination,[18] established and operated by respondents, constitutes price fixing forbidden by the antitrust laws. This is amply demonstrated by this Court's holding in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950), that a minimum fee schedule arrangement, which lacked the component of sanctions provided here by State Bar Opinions 98 and 170, was a violation of the Sherman Act. In fact, the Court of Appeals found that it was "abundantly clear . . . that the fee schedule and the enforcement mechanism supporting it, act as a substantial restraint upon competition among attorneys practicing in Fairfax County" (App. B, p. 13). Nonetheless, it held that these activities were immune from antitrust liability because they were carried on by members of a "learned profession." In the sections which follow, petitioners will demonstrate that this ruling is in error because it is inconsistent with the broad purpose and scope of the Sherman Act, is not supported by the decisions relied on, and is directly contrary to *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), and other relevant authorities.

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[18] Although the fee schedule charge is reduced to 1/2 of 1% for amounts above $50,000, with further reductions thereafter (Exhibit 29, p. 25, A 40), we will refer to the fee as a 1% charge for convenience.

A. The Reach Of The Sherman Act Is Broad, And Exemptions From It Are Narrowly Construed And Congressional In Origin

This Court recently described the antitrust laws in general and the Sherman Act in particular as ". . . the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates*, 405 U.S. 596, 610 (1972). In reference to the breadth of the coverage of Section 1 of the Sherman Act, this Court has observed: "Language more comprehensive is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). Or, as Mr. Justice Sutherland stated in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932), Congress, in passing the Sherman Act ". . . meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." To that end, the terms trade or commerce "have been interpreted broadly . . ." *United States v. Shubert*, 348 U.S. 222, 226 (1955), and the Act has been applied wherever there is ". . . some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940). And where price fixing is involved, this Court has specifically brought within the Sherman Act every activity of that kind:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the

> participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease prices. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956).

Although numerous attempts have been made to create exemptions for classes of persons whose conduct is within the Sherman Act, based upon the special status of the class, this Court has consistently refused to allow an exception absent a specific authorization from Congress. Thus, restraints on the free market imposed by doctors,[19] real estate brokers,[20] and pharmacists[21] have all been held subject to the Sherman Act. In addition, the proscriptions of the Sherman Act have been applied to "intangibles", *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533, 546 (1944), and theatrical productions, *United States v. Shubert*, 348 U.S. 222 (1955). And when an organization engaged in the collection, assembly, and distribution of news sought a Sherman Act exemption based on the special status of its members under the First Amendment, this Court refused to grant it, noting that the publishers were ". . . engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people need or want." *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

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19 *American Medical Ass'n v. United States*, 317 U.S. 519 (1943).

20 *United States v. National Association of Real Estate Bds.*, 339 U.S. 485 (1950).

21 *United States v. Utah Pharmaceutical Ass'n.*, 201 F. Supp. 29 (D. Utah), *aff'd*, 371 U.S. 24 (1962); *Northern California Pharmaceutical Ass'n. v. United States*, 306 F.2d 379 (9th Cir.), *cert. denied*, 371 U.S. 862 (1962).

What has repeatedly emerged from this Court's decisions is that the broad reach of the Sherman Act will not be undercut by implying exemptions not specifically enacted by Congress. As this Court stated in the *South-Eastern Underwriters* decision, *supra*, 322 U.S. at 561: "Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court." Such an exception was promptly written into the law after the decision in *South-Eastern Underwriters*,[22] just as an exception for the activities of labor unions was enacted when some years earlier their activities became subject to Sherman Act injunctions. See *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 801-06 (1945). And when the dairy cooperatives were excluded from the reach of the Sherman Act, it was accomplished not by court decision but by statutes. See *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 464 (1960).[23]

The rationale for refusing to imply Sherman Act exemptions is articulated in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), where this Court was asked to relax the application of a *per se* rule in order to promote competition in one industry, while sacrificing it in another. In declining the invitation, this Court noted its "inability to weigh, in any meaningful sense" the competing considerations, *id.* at 609-610, and then stated that "the judgment

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22 McCarran Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011-1015.

23 Even where Congress has enacted specific exemptions, this Court has narrowly construed them. See *Allen Bradley Co. v. Local Union No. 3, supra; Maryland & Virginia Milk Producers Ass'n. v. United States, supra;* and *United States v. McKesson & Robbins, supra.*

of the elected representatives of the people is required" before any such exception should be created. *Id.* at 612. These very considerations should have led the Court of Appeals to conclude that in the absence of a Congressional directive, the price fixing activities of attorneys were within the Sherman Act. However, it reached a contrary conclusion, albeit without commenting on either the breadth of the Sherman Act or the reluctance of this Court to create judicial exemptions from it. Therefore, we shall now examine the authorities relied upon by the appellate court and show that, even standing alone, they do not support an exemption for the "learned professions" from the price fixing activities found here.

B. The Decisions Relied Upon by the Court Below Do Not Support A "Learned Profession" Exemption

The majority of the Fourth Circuit panel stated that there are two decisions of this Court which "hold" that there is an exemption from the antitrust laws for the learned professions (App. B, p. 13). In our view the dissent was entirely correct in its observation that those cases contain no more than *dicta* and do not support any such exemption (App. B, p. 23). Thus, in *Federal Trade Comm. v. Raladam Co.*, 283 U.S. 643 (1931), the question presented was whether the defendant, a seller of patent medicines, had engaged in "unfair methods of competition" under the Federal Trade Commission Act. It was in that context that this Court stated that "[o]f course, medical practitioners. . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but

in prescribing them." *Id.* at 653. Whatever the import of that language may be in other contexts, it certainly does not constitute a holding that learned professions are exempt from the Sherman Act.

The second decision relied upon by the Fourth Circuit is *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). This Court, however, has recently made crystal clear that which was already apparent – that its holding in *Federal Baseball* applies only to baseball:

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and anomaly. *Federal Baseball* and *Toolson [v. New York Yankees, Inc.*, 346 U.S. 356 (1953)] have become an aberration confined to baseball.
> *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).[24]

Even the language from *Federal Baseball* relied on by the Court of Appeals – "a firm of lawyers sending out a member to argue a case . . . does not engage in [interstate] commerce because the lawyer . . . goes to another state [259 U.S. at 209]" – was directed primarily at the question of whether the requirement of interstate commerce had been met, and not at the question of whether there was an exemption from the antitrust laws for the activities of professional baseball players or attorneys based on their profession. This is the view of *Federal Baseball* taken by all three judges in *Gardella v. Chandler*, 172

[24] This Court had previously refused to grant an antitrust exemption to boxing, *United States v. International Boxing Club*, 348 U.S. 236 (1955), and football, *Radovich v. National Football League*, 352 U.S. 445 (1957), and recently a circuit court declined to exempt amateur softball, *Amateur Softball Ass'n. v. United States*, 467 F.2d 312 (10th Cir. 1972).

F.2d 402 (2d Cir. 1949). As each of the separate opinions indicates, it was the failure to meet the interstate commerce requirements which had resulted in the antitrust immunity for baseball.[25] *Accord,* Note *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities,* 82 Yale L.J. 313, 318-320 (1972) (hereinafter "Note, *'Non-commercial' Activities").*

The majority below also relied on the decision in *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427 (1932), asserting that it "recognized that the practice of a 'learned profession' is not a trade" (App. B, p. 13). In expanding the definition of "trade" in Section 3 of the Sherman Act in *Atlantic Cleaners* to include providers of laundry and dry cleaning services, this Court referred to an opinion of Mr. Justice Story in *The Nymph,* 18 Fed. Cas. 506, 507 (No. 10,388) (C.C. D., Me. 1834), interpreting the Coasting and Fishery Act of 1793 which also utilized the term "trade." In so doing, Justice Story indicated that "trade" would include any occupation carried on for gain " . . . not in the liberal arts or in the learned professions . . .," and it is this language, carried forward into *Atlantic Cleaners,* which was cited by the

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25 Judge Chase concluded that this Court had found that baseball teams "were not engaged in interstate trade or commerce within the scope of the antitrust laws." 172 F.2d at 404. Judge Learned Hand stated that "the Court merely thought [the interstate activities] not important enough to fix the business – at large – with an interstate character." *Id.* at 408. Judge Frank observed that the "concept of commerce has changed enough in the last two decades so that, if that case were before the Supreme Court de novo, it seems very likely that the court would decide the other way." *Id.* at 409, n. 1. In distinguishing the earlier case, Judge Frank said that "the traveling across state lines was but an incidental means of enabling games to be played . . . and therefore insufficient to constitute interstate commerce." *Id.* at 410.

court below to sustain the position that a "learned profession" exemption exists for lawyers under Section 1. In our view, the Court of Appeals of the District of Columbia Circuit was correct in its analysis of the *Atlantic Cleaners* opinion when it stated that the remarks of Justice Story were "purely casual" and not a "proper guide in deciding the important question in this case [of whether restraints by the medical profession were within the Sherman Act.]" *United States v. American Medical Ass'n,* 110 F.2d 703, 709, *reversing,* 28 F. Supp. 752 (D. D.C. 1939), *cert. denied,* 310 U.S. 644 (1940).[26]

In addition, we submit that the Court of Appeals below was clearly erroneous in its interpretation of this Court's decision in *American Medical Association v. United States,* 317 U.S. 517 (1943) (hereinafter "*AMA*"). Because of the significance of that decision to the present case, we shall proceed directly to it and include a discussion of the Fourth Circuit's interpretation within our over-all discussion of that case.[27]

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26 Judge Sharp in *United States v. Oregon State Bar, supra,* also concluded that the "learned profession" language in *Atlantic Cleaners* and *Raladam Co.* was *dicta* (Ad. B, pp. 15, 16).

27 The additional authorities relied upon by the majority below require only brief discussion. *Riggal v. Washington County Medical Society,* 249 F.2d 266, 268 (8th Cir. 1957), simply asserts that the plaintiff's medical practice was not trade or commerce under the Sherman Act. The decision in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.,* 432 F.2d 650 (D.C. Cir.), *cert. denied,* 400 U.S. 965 (1970), actually assists petitioners, as noted at pages 41-42, *infra.* The other authority relied on by the appellate court, Mr. Justice Jackson's statement in *United States v. Oregon State Medical Society,* 343 U.S. 326, 336 (1952), that "forms of competition usual in the business world may

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C. This Court's Decision In *American Medical Association v. United States*, Along With Other Authorities, Establishes That There Is No Exemption For The Price Fixing Activities Of Attorneys.

In *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), this Court sustained a Sherman Act conviction against two medical societies and a number of doctors where the purpose and effect of the conspiracy was to destroy the business of Group Health Associates ("GHA"), a provider of medical services on a prepaid basis, utilizing staff physicians. The medical societies in *AMA* had threatened to discipline any doctor who joined the staff of GHA or any doctor who consulted with any such doctor. In addition, any hospital which offered facilities for patients of doctors working for GHA was threatened with boycotts and other reprisals. The result of the conspiracy was to restrain the practice of those doctors who wished to work for GHA, but were afraid to do so, and to limit those who chose to work for GHA by narrowing the availability of doctors who would consult with them and hospitals in which they could place their patients.[28]

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[27] (continued) be demoralizing to the ethical standards of a profession" was *dicta*, issued with a holding that there was no proof of either a boycott or any effect on interstate commerce. That case did not purport to overrule *AMA*, and hence that statement indicates only that in applying the rule of reason, where appropriate, a court should consider the ethical aspects of the profession involved.

[28] The facts in the *AMA* case are set forth in detail in the two lower court opinions, *United States v. American Medical Ass'n*, 28 F. Supp. 752 (D. D.C. 1939), and *United States v. American Medical Ass'n*, 110 F.2d 703 (D.C. Cir. 1940).

While this Court in *AMA* concluded that it was not necessary to decide whether the practice of medicine was a "trade" under the Sherman Act, 317 U.S. at 528, the Court held that the conspiracy which was "aimed at restraining or destroying competition . . . or [restraining] the free availability of medical or hospital services in the market . . ." did constitute a violation of the antitrust laws. *Id.* at 529.[29] The Court held further that the occupations of the defendants were "immaterial if the purpose and effect of their conspiracy was [the] obstruction and restraint of the business of Group Health." *Id.* at 528.

The majority below recognized the viability of *AMA*, but purported to distinguish it (App. B, p. 15). Citing *AMA*, it acknowledged that a conspiracy to obstruct the interstate sale of health insurance would be within the Sherman Act. It then suggested, however, that a conspiracy by a group of doctors to restrain the practice of another member of their profession would not be a Sherman Act violation because the restraint would be on the practice of a learned profession which is neither trade or commerce. Based upon that distinction, the majority concluded that the minimum fee schedule system at issue here was outside the Sherman Act. That distinction is not supported by anything in this

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[29] If this Court should reach the question left open in *AMA*, we fully support the analysis of the Court of Appeals in *United States v. American Medical Ass'n, supra*, 110 F.2d at 707-712, and its conclusion that the common law doctrine of restraint of trade, as incorporated in the Sherman Act, encompasses the restrictions on competition imposed by the doctors and their medical societies in that case and by respondents in this one. *Accord*, Note *"Non-commercial" Activities, supra*, 82 Yale L.J. at 321-324.

Court's ruling in *AMA*, and to the extent that any such distinction exists, this case is within *AMA*. Indeed, this Court in *AMA* specifically noted that, if the conspiracy is intended either to restrain or destroy competition or to restrict the free availability of medical or hospital services in the market, then the Sherman Act would be violated. 317 U.S. at 529.

Like the conspiracy in *AMA*, a conspiracy among lawyers to restrain the practice of other lawyers, by prohibiting them from charging the fees they deem proper, is precisely one of the activities which would restrain the free availability of legal services in the market place. Contrary to the Fourth Circuit's view, such a conspiracy would be squarely within the ruling in *AMA*. While there may be conspiracies among lawyers which arguably do not violate the Sherman Act, the conspiracy here, by restraining the availability of lower cost legal services, clearly violates the Act.[30] The restraint here operates to limit the choice of home buyers in the Northern Virginia-Washington, D.C. area, and to restrict the movement of interstate mortgage money, by eliminating competition in the price to be charged for attorneys fees for a title examination, a necessary part of any financing transaction for homes purchased in Northern Virginia. Just as it was the consumers of medical services who ultimately were deprived of their choice of medical service plans as a result of the defendants' conspiracy in *AMA*, so here it is purchasers of homes in

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30 An agreement among the members of the Bar that a search going back sixty years was an appropriate period for a title examination might be considered to be a "restraint" on the practice of the profession of law, yet not be within the Sherman Act's prohibition because, among other reasons, of the application of the rule of reason in that situation.

Northern Virginia who are ultimately paying the cost imposed by the restrictions on the pricing policies of attorneys resulting from the minimum fee schedule arrangement of respondents. In both instances restrictive practices were established and discipline threatened against the members of the profession who did not adhere. Any doubts that these restraints are within the Sherman Act are dispelled by this Court's holding in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950). Defendants argued there that their fee schedule did not restrain "trade or commerce" under the Sherman Act for reasons similar to those adopted below, but that position was rejected based on *AMA*, notwithstanding a warning by Mr. Justice Jackson that similar schedules used by doctors and lawyers also would be unlawful. *Id.* at 496. The conspiracy here is substantially the same as those sustained in *AMA* and in the *Real Estate Boards* decision, and, accordingly, the "learned profession" exemption, if it exists at all, is inapplicable here.

In addition, one of the decisions relied on by the majority below, *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970), also supports our position. In that case the defendant, a non-profit educational corporation had refused to accredit Marjorie Webster Junior College because it was a profit making institution. In declining to apply the antitrust laws, the D.C. Circuit adopted a "commercial-non-commercial" distinction which is relevant here:

> "[T]he proscriptions of the Sherman Act were tailored . . . for the business world, not for the *non-commercial aspects* of the liberal arts and

> the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the *commercial aspects* of the profession, is not sufficient to warrant application of the antitrust laws" 432 F.2d at 654 (footnote omitted, emphasis added).

The court concluded by observing that even some requirements of accreditation, if they could be shown to have purely commercial motives, might bring the antitrust laws into play, *id.* at 654-55.[31] See also *Northern California Pharmaceutical Ass'n v. United States, supra,* 306 F.2d at 385, in which the Court stated that where restraints are imposed in the "area of 'entrepreneurial' rather than professional activity," members of a profession are subject to liability for violations of the Sherman Act.

Based upon the *Marjorie Webster* and *Northern California Pharmaceutical Ass'n* decisions, the setting of fees under minimum fee schedules would surely come within the commercial prohibitions of the Sherman Act since, as the District Court noted, " . . . fee setting is the least 'learned' part of the profession" (App. A, p. 5). Whatever doubt there might be concerning the "commercial" aspects of these fee schedules is dissipated by the quotation placed at the beginning of the State Bar's 1962 Fee Report by the Bar's Committee on Economics which prepared the Report: "The lawyers have slowly, but surely, been committing

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31 Thus, it is difficult to comprehend the basis upon which the Court of Appeals stated that the opinion in *Marjorie Webster* supported the proposition that the courts have been "reluctant to superimpose upon the professions the sanctions of the antitrust laws . . ." (App. B, p. 14).

economic suicide as a profession", with the Report suggesting minimum fee schedules as a remedy (Exhibit 26, p. 2, A 20). As Judge Craven noted in his dissent below, the practice of law "is pursued for the purpose (among others) of earning a living. To that extent I think it falls within the strictures of the Sherman Act, and I would affirm the decision below" (App. B, p. 24).[32]

D. Policy Considerations Strongly Support The Inclusion Of Lawyer's Minimum Fee Schedules Under The Sherman Act.

On numerous occasions this Court has emphasized the importance of the effective assistance of counsel, particularly in the context of a criminal case. See *Gideon v. Wainwright,* 372 U.S. 335 (1963). In addition, four recent decisions of this Court have held that the First Amendment protects groups who wish to associate together in order to obtain inexpensive counsel of their choice in the face of challenges by State Bars which sought to place restrictions on those practices.[33] Given the protection which this Court has held to be constitutionally required for those in need

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32 Although it would seem that lawyers would be aware of the rising costs of providing legal services and adjust their rates accordingly, the State Bar apparently felt that it needed to aid practitioners by issuing its 1969 Fee Report with "a general scaling up of fees for legal services . . . because of the escalating cost of operating a law office and the *spiraling increase in the cost of living in recent years* (Exhibit 27, p. 3, A 25, emphasis added).

33 *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964); and *NAACP v. Button,* 371 U.S. 415 (1963).

of legal assistance, it would be ironic indeed to hold that Congress intended to exempt this important service from the price fixing prohibitions of the Sherman Act.

The effect on consumers and the rest of the business community of permitting lawyers to fix their rates by using minimum fee schedules can be illustrated by focusing on the purchase of a house in Reston, where the Goldfarbs acquired their home. There can be no doubt that the various developers in Reston could not lawfully agree on prices to be charged for homes, nor could the real estate agents establish a uniform fee for their commissions. Similarly, the banks in Northern Virginia, as well as those servicing that area from outside of the State, could not agree to charge a set rate of interest, nor could the title insurance companies all agree to the same rates, unless regulated by a state insurance commission which specifically approved such charges. But under the result condoned by the Fourth Circuit, the attorneys who perform the essential function of title examination on the Goldfarbs' home, without which the transaction could not have been completed, are perfectly free to enter into a price fixing arrangement without fear of Sherman Act liability. We respectfully suggest that nothing in the Sherman Act, its history in the courts or the Congress, or any other reason justifies for exempting lawyers' price setting activities from the prohibition applicable to everyone else involved in the purchase of a home or similar commercial transactions. See Note, *"Non-commercial" Activities,* 82 Yale L.J. at 321-334, and Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv L. Rev. 971 (1972). But see *Lincoln Rochester Trust Co. v. Freeman,* 34 N.Y. 2d 1, 335 N.Y.S.2d 336, 311 N.E.2d 480 (1974) (construing the New York State antitrust statute in the context of

a request for court awarded fees utilizing a bar association fee schedule).

Finally, to the extent that the opinion of the majority below rests upon an implicit concern that the regulation of the legal profession will be placed entirely under the control of the marketplace, that fear is not justified. Outside the area of *per se* violations, such as price fixing, *i.e.,* in cases involving the application of the rule of reason, the courts may properly consider the professional status of the participants as Mr. Justice Jackson noted in *United States v. Oregon Medical Society,* 343 U.S. 326, 336 (1952). *Accord, United States v. Oregon State Bar, supra* (Ad. B, p. 20).

Furthermore, if the activities of lawyers are properly regulated by the State, they would be exempt under *Parker v. Brown,* 317 U.S. 341 (1943), discussed in Point III, *infra.* The Court of Appeals majority in its concluding paragraph discussing the "learned profession" exemption appears to confuse the "learned profession" exemption with *Parker v. Brown* immunity when it states that "the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the 'learned profession' exemption" (App. B, p. 15). The two doctrines are separate, and we respectfully suggest that if attorneys are regulated by the State in a manner entitling them to an exemption under *Parker v. Brown,* then that is the way in which they should be relieved from liability under the Sherman Act. If they do not meet such criteria, then, contrary to the assertion of the majority below, there is no exemption for "learned professions" which would permit them to fix fees as they have done in this case.

II. THE ACTIVITIES OF THE RESPONDENTS HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE

Introduction

There are two approaches under which the Sherman Act's requirement of "commerce among the several States" can be satisified: "it is well established that an activity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce." *Burke v. Ford*, 389 U.S. 320, 321 (1967) (emphasis in original). Petitioners have never claimed that the activities of respondents occurred *in* interstate commerce, but simply that they have a substantial effect on interstate commerce.

To support their position, petitioners established, and the District Court found as facts, several distinct interstate aspects of the home purchasing and financing markets, which are the two markets affected by the restraints on title examination fees imposed by respondents. First, petitioners demonstrated that the home buying market in Northern Virginia is interstate since in 1970 more than thirty percent of the persons five years of age or older residing in Arlington County, Fairfax County, and the City of Alexandria — the geographic area principally served by the members of the Fairfax Bar — were not Virginia residents in 1965 (Finding 1, App. A, pp. 6-7). In addition, the trial judge also found "uncontradicted evidence" that a "large percentage" of Fairfax County residents work outside Virginia (App. A, p. 4). Second, as to the interstate nature of the home financing industry, a ten percent sampling of the deeds of trust for 1970 and 1971 for Fairfax County indicated that, of more than $136,000,000 in real

estate loans in that sample, more than $75,000,000 was advanced by persons residing outside of, or incorporated outside of the Commonwealth of Virginia (Finding 2, App. A, p. 7). Petitioners also established that the vital guarantee sector of the home loan industry is interstate: in Northern Virginia during 1968-1972 more than $570,000,000 in home loans were guaranteed by the United States Veterans Administration, headquartered in the District of Columbia, or insured by the United States Department of Housing and Urban Development, also headquartered in the District of Columbia (Findings 3 & 4, App. A, p. 7).

Admittedly, almost all of the work connected with examining title to Fairfax County real estate is performed in Virginia. Petitioners contend, nonetheless, that since a title examination is a necessary part of a larger set of transactions which are interstate in character, the restraints at issue here are covered by the Sherman Act. Thus, because the minimum fee schedule system operates to restrict the pricing policies of attorneys who perform title examinations, it has a substantial effect on home buying and home financing which are interstate transactions. None of the factual findings made by the District Court is challenged by respondents, nor were they disputed by the majority in the Court of Appeals.[34] That Court simply held that the facts as found were insufficient as a matter of law to meet the commerce requirement of the Sherman Act. In doing so, it focused excessively, and erroneously, on the local nature of title examinations and failed to see that they affected

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[34] For this reason the case is distinguishable from interstate commerce decisions such as *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952).

interstate transactions and that, therefore, the jurisdictional requirement of the Sherman Act was met.

The first of the two sections which follow discusses the interstate commerce decisions of this and other courts under the Sherman Act and in other analogous areas. We do so recognizing that none of the cases presents an identical factual situation to this one, and with an awareness that "precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3rd Cir. 1973).[35] The second portion of this argument is directed to the specifics of this case in light of the relevant authorities and points out the principal reasons that we believe the Court of Appeals was in error.

A. The Reach Of The Sherman Act Is Exceedingly Broad And Covers Wholly Local Activities Which Have A Substantial Effect On Interstate Commerce.

While determinations of commerce questions under the Sherman Act must be resolved on a case-by-case basis, the decisions of this Court do establish a number of propositions which serve as useful guideposts in measuring the opinion of the majority below on the commerce question. Of particular relevance to this case, since the minimum

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35 One of the best discussions of the test to be applied in resolving the commerce question is contained in *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521-24 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973).

fee schedules involved here cover title examinations performed wholly in Virginia, is the ruling of this Court in a decision totally ignored by the majority, *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954): "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." Or, as Mr. Justice Jackson so nicely stated in *United States v. Women's Sportswear Mfgs. Ass'n*, 336 U.S. 460, 464 (1949):

> The source of the restraint may be intrastate as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

See also *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234-237 (1948).

A further guide to the interpretation of the commerce requirement is the oft-quoted remark of Mr. Justice Holmes that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). When the defendant in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), suggested that the test for interstate commerce purposes was whether the activity in question was essentially local, it was rejected as a "type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power." *Id.* at 546. See also *Rasmussen v. American Dairy Ass'n*,

supra, 472 F.2d at 523 (commerce questions under the Sherman Act should not be decided based on "abstract or mechanistic formulae").

Most importantly, this Court has held that the ambit of the Sherman Act is coextensive with the power of Congress to regulate commerce under the Commerce Clause. "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 [1940]." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945). Therefore, as the Ninth Circuit recently noted, "every Sherman-Act holding that jurisdiction does not lie is a holding that the evil alleged is beyond the power of Congress to control." *Copp Paving Co. v. Gulf Oil Co.*, 487 F.2d 202, 204 (1973), *cert. granted*, 415 U.S. 988 (1974) (*certiorari* granted only as to commerce questions under the Robinson-Patman and Clayton Acts).* Thus, the decisions expanding the reach of the Commerce Clause have added new dimensions to the coverage of the Sherman Act as well. *Rasmussen v. American Dairy Ass'n, supra*, 472 F.2d at 521. Accordingly, it is appropriate to examine some of the recent rulings of this Court involving other statutes enacted under the Commerce Clause in order to determine the current breadth of the Sherman Act.

Perhaps the most significant case for this proceeding is *Wickard v. Filburn*, 317 U.S. 111 (1942), in which a nationwide marketing allotment for wheat was upheld as it applied to the 11.9 acres of plaintiff's land which he claimed Congress could not regulate under the Commerce Clause. The power of Congress to regulate that particular wheat production was sustained even though it was to be consumed entirely on the grower's own property for

* This Court's December 18, 1974, decision in that case does not affect the validity of the quote or modify other positions taken by petitioners.

such purposes as feeding of poultry and livestock, making bread for the family, and planting seeds for the following year. The basis of that holding was that Congress could properly determine that such added production might have an effect on the overall interstate market for wheat even though the plaintiff's wheat never left his farm. *Id.* at 114.

Recent decisions involving civil rights legislation further demonstrate the breadth of the Commerce Clause. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), this Court upheld as within the power of Congress to regulate commerce, the prohibition on segregation at local lodgings serving interstate travelers where Congress concluded that such local activities might have the effect of restricting the interstate movement of Black people.[36] In so doing, this Court stated that the determining test under the Commerce Clause ". . . is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest." *Id.* at 255. In the companion case of *Katzenbach v. McClung*, 379 U.S. 294 (1964), this Court sustained the applicability of a federal public accommodations statute to a local restaurant over Commerce Clause objections, where there was no claim that interstate travelers had frequented the restaurant. The basis of the ruling was a finding that ". . . a substantial portion of the food which it serves . . . has moved in commerce."[37] *Id.* at 298.

36 A clear indication that the Sherman Act was intended to reach its constitutional limits is the holding that the Heart of Atlanta Motel was sufficiently engaged in interstate commerce to be subject to the antitrust laws. See *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel Inc.*, 232 F. Supp. 270 (N.D. Ga. 1964).

37 In fact, the interstate shipment of food was primarily $70,000 of meat purchased over the previous twelve months. *Id.* at 296.

See also *Perez v. United States,* 402 U.S. 146 (1971) (sustaining as a proper exercise of power under the Commerce Clause a federal prohibition on wholly intrastate "loan-sharking" because of a Congressional finding of its tie-ins with interstate criminal activities); *Daniel v. Paul,* 395 U.S. 298, 305 (1969); and *Maryland v. Wirtz,* 392 U.S. 183 (1968).

This Court has ruled in a price fixing case that once an effect on interstate commerce is shown "[i]t makes no difference . . . whether the amount of interstate commerce affected is large or small . . ." *United States v. McKesson & Robbins,* 351 U.S. 305, 310 (1956).[38] In addition, a close analysis of this Court's decision in *Burke v. Ford,* 389 U.S. 320 (1967), reveals that where a *per-se* offense occurs totally intrastate, but is an element in a larger business chain that is interstate, adverse effects on interstate commerce will be presumed. In such cases no specific inquiry as to the effects on interstate commerce is necessary since these restraints "inevitably" affect interstate commerce. *Id.* at 321.[39] As the Ninth Circuit noted in *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 528, ". . . specific consequences may be speculative, but the reality of the economic impact is not." See also *Mandeville*

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[38] The Sherman Act has even been held applicable to sustain a criminal conviction for a price-fixing conspiracy involving a single dishwasher which moved in interstate commerce. *United States v. Bensinger Co.,* 430 F.2d 584 (8th Cir. 1970).

[39] The plaintiffs in *Burke* proved a division of liquor markets by territories and brands involving all Oklahoma wholesalers, all of whose stock came from outside the State. Both lower courts ruled that there was an insufficient effect on interstate commerce shown. This Court granted *certiorari* and simultaneously reversed those rulings.

Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 240 (1948) ("it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the overall activity . . .").

These authorities demonstrate, we submit, that the Commerce Clause, and hence the Sherman Act, have been given exceedingly broad interpretations by this Court. They also establish that the determination of whether the commerce requirement has been met necessitates an examination of the entire transaction and that focusing on the location of the restraint will not suffice. It is with these guidelines that we will examine the undisputed findings by the District Court on this issue and analyze the holding of the Court of Appeals that no substantial effect on interstate commerce was shown.

B. Based Upon The Undisputed Facts Found By The District Court, Petitioners Have Established That The Activities Of Respondents Have A Substantial Effect On Interstate Commerce

Petitioners proved, and the District Court found, that two interstate markets were affected by the use of respondents' fee schedules. First, there is the effect on the interstate movement of home buyers. This is evidenced by the fact that thirty percent of the residents in Northern Virginia in 1970, aged 5 years and older, were not residents of the State in 1965. In addition, as the District Court found, and as the dissent in the Court of Appeals quite correctly indicated could be judicially noticed (App. B, p. 22), Fairfax County is one of the bedroom communities for Washington, D.C. In concluding that the housing market in

Northern Virginia "cannot realistically be considered a purely local market," Judge Craven's dissent noted that the "price that thousands of employees in the District of Columbia have to pay for housing in Fairfax County, Virginia, has, it seems to me, a direct, immediate, and substantial effect on interstate commerce." *Id.* In short, the fees for title examination services required in connection with home purchasing inevitably raises the cost of closings and hence restricts the options of home buyers who may work in Washington but wish to live in one of the surrounding communities, including Northern Virginia. Moreover, we submit that under *Burke v. Ford, supra,* once a *per se* violation involving interstate transactions has been proven, the specific effects on interstate commerce need not be demonstrated.

Second is the effect on interstate commerce involved in the interstate loans for home financings in Northern Virginia. Petitioners' witness examined selective deeds of trust on real estate in Fairfax County in what the District Court considered to be a "fair sampling of loans made on [such] real estate" and from which it concluded that "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia." (App. A, p. 4). The trial court also found that all or nearly all of the lenders require "as a condition of making the loan, that the title to the property involved be examined and that title insurance be furnished and paid for by the home buyer-mortgagor." *Id.* Since under an opinion of the Virginia State Bar,[40] the examining of title and giving an opinion as to the state of it constitutes the practice of law and hence must be performed by lawyers, it is

[40] See note 3, *supra,* p. 4.

clear that virtually every loan made on a home in Northern Virginia requires the services of an attorney. Moreover, as found by the District Court, "there is a significant degree of adherence to the Minimum Fee Schedule (Exhibit 29) in the determination of fees" for title examination services (Finding No. 6, App. A, p. 8). We submit that the District Court was entirely correct in its conclusion that the proportion of out-of-state funds utilized to finance homes in Fairfax County by itself "warrants the conclusion that interstate commerce is sufficiently affected [by the minimum fee schedule system] to sustain jurisdiction under the Sherman Act" (App. A, p. 4).

The District Court also found that "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia. *Id.* Thus, in 1972 alone, those two agencies guaranteed in excess of $138.5 million in home loans in Northern Virginia (Findings 3 and 4, App. A, p. 8). Accordingly, even when the loan may have been made by a Virginia financial institution to a buyer who works and resides in Virginia, the guarantee may have been an interstate transaction and hence not a purely local one as suggested by the majority of the Court of Appeals.

The dissent contended that under *Burke v. Ford, supra,* (a decision not mentioned by the majority) the requisite effect on interstate commerce had been shown notwithstanding the intrastate nature of the title examination itself (App. B, p. 21). In addition, it quoted from *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., supra,* and from *United States v. Women's Sportswear Mfgs. Ass'n, supra,* to demonstrate the error of the majority in focusing on the

intrastate aspects of the process (App. B, p. 22). After reviewing other authorities and examining the uncontradicted facts found by the District Court, the dissenting judge concluded that the District Court was correct in holding that the requirement of commerce among the several states had been met.

Given the breadth of the interstate commerce shown here – a thirty percent influx into Northern Virginia in a five-year period, more than fifty percent of the homes financed from outside of Virginia, and several hundred million dollars in interstate guarantees issued – it is somewhat difficult to comprehend the basis on which the Court of Appeals concluded that petitioners had not established an effect on "commerce which concerns more states than one and has a real and substantial relation to the national interest"[41] or that these were not transactions "which, reaching across state boundaries, affect the people of more states than one . . ."[42] Given this Court's decisions in *Wickard v. Filburn, Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung, supra,* there appears to be no basis for the appellate court to have concluded that Congress could not constitutionally proscribe these activities of respondents, a conclusion which necessarily follows in view of this Court's ruling in *United States v. Frankfort*

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41 *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 255 (1964). In 1973 there were more than $66 billion in home mortgage loans made in the United States, U.S. Department of Housing and Urban Development, *Gross Flows,* HUD 74-85, March 19, 1974. As of December 31, 1973, the total amount of outstanding home mortgage loans exceeded $386 billion. Federal Reserve Bulletin, October 1974, A-44.

42 *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 552 (1944).

Distilleries, Inc., 324 U.S. 293, 298 (1945), that in enacting the Sherman Act Congress exercised all of the power that it possessed.[43]

On what basis, then, did the Court of Appeals conclude that the interstate commerce requirement had not been met? One sentence in its opinion, perhaps better than any other, epitomizes the errors into which the majority fell:

> The fact that [lawyer's] services are *occasionally* used by persons who are simultaneously engaged in an *ancillary* interstate transaction to facilitate the conduct of that transaction is merely "incidental"; this does not justify federal regulation of competitive restraints upon a business which is "wholly local" in character. (App. B, p. 18, emphasis added).

Initially, the statement is factually unsupported by the record. The District Court specifically found that all or nearly all lenders require title examinations, and hence there is no basis for the assertion that those services are "occasionally" used by home buyers. Moreover, the reference to an "ancillary interstate transaction" confuses the ancillary with the primary transaction. The primary transaction is the financing of a home, which in more than half the cases

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43 The cases cited by the majority in footnotes 48, 49, and 50 are of dubious validity following *Wickard v. Filburn, Heart of Atlanta Motel, Inc. v. United States,* and *Katzenbach v. McClung, supra,* if they ever were correct. *See Doctors Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48, 51-53 (3rd Cir. 1973). And its attempt to distinguish *Heart of Atlanta Motel* in footnote 50 cannot be accepted in light of this Court's ruling in *Katzenbach v. McClung, supra,* decided with *Heart of Atlanta Motel,* which does not involve alleged restraints on interstate travelers.

involves an out-of-state lender. In order to obtain this financing, the "ancillary" service of a title examination, performed by a Virginia attorney, is obligatory (App. A, p. 4).[44] Therefore, if characterizing in such verbal formulae were any help, we suggest that it is the legal service which is "ancillary" to the basic interstate financing transaction, and not, as the Court of Appeals suggested, the reverse. But as Mr. Justice Jackson warned in *Wickard v. Filburn, supra,* 317 U.S. at 120, these questions should not be decided based on nomenclature, but upon their effects on interstate commerce.[45]

The quoted passage from the majority opinion also demonstrates an unwarranted focus on the location of the services rendered, rather than an overall examination of the effects of the particular restraints to determine their possible relationship to larger transactions which are interstate in nature. As this Court observed in *United States v. Frankfort Distilleries, Inc., supra,* 324 U.S. at 297, and as the majority appears to have overlooked, ". . . there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an *inseparable element* of a larger program dependent for its success upon activity which affects commerce between the

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44 Title insurance, for which a title examination is required, is mandatory only when financing a home. However, even the rare purchasers who pay entirely in cash may elect to have title insurance to protect themselves, in which case the same title examination -- at the same rates - must be obtained.

45 Mr. Justice Jackson's distaste for reliance on catchwords to answer questions under the Commerce Clause, as the Court of Appeals did here, is evidenced by his comment in *Wickard* that "the term 'direct' [as applied to the effects on commerce] was used for the purpose of stating, rather than of reaching a result. . ." *id.* at 122-123.

states" (emphasis added). Similarly neglected by the majority was this Court's statement in *United States v. Employing Plasterers Ass'n,* 347 U.S. 186, 189 (1954), that wholly local business restraints can produce effects condemned by the Sherman Act. See also *United States v. Women's Sportswear Mfgs. Ass'n, supra,* 336 U.S. at 464: "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

In our view the proper analysis is that employed by the Third Circuit in *Doctors Inc. v. Blue Cross, supra,* and the Fifth Circuit in *Battle v. Liberty National Life Ins. Co.,* 493 F.2d 39, 47-48 (1974), in which all of the interstate aspects of the transactions were considered together in determining whether the Commerce Clause requirements of the Sherman Act had been met.[46] However, even considering the interstate elements separately, the Courts of Appeals other than the Fourth Circuit have sustained Sherman Act allegations involving parts of real estate transactions which surely had no greater than, and probably less, connection with significant interstate commerce than was shown here. See *Brett v. First Federal Savings and Loan Ass'n,* 461 F.2d 1155 (5th Cir. 1972); *Bratcher v. Akron Area Board of Realtors,* 381 F.2d 723 (6th Cir. 1967). See also *Gateway Associates, Inc. v. Essex-Costello, Inc.,* 1974-2 Trade Cas. ¶75,231 at 97,538 (N.D. Ill. 1974); *Mazur v. Behrens,* 1974-2 Trade Cas. ¶75,070 at 96,787 (N.D. Ill. 1972), and *United States v. Atlanta Real Estate Board,* 1972 Trade Cas. ¶74,582 (N.D. Ga. 1971).

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46 Judge Craven in dissent found that petitioners had established the requisite effect on interstate commerce based on the "cumulation of these facts" (App. B, p. 22).

In this case there is a truly interstate market among home buyers who may choose among three jurisdictions in which to reside while working in the Washington, D.C. Metropolitan area. For the average home buyer, the addition of a flat fee of 1 percent of the purchase price for a title examination, payable at the closing when the cash burdens are at a peak, is a serious impediment to the acquisition of a home in the Virginia sector of this market. This same impediment applies to obtaining a loan to purchase the home in the home financing market, which is interstate because of the out-of-state origin of the loan and/or its guarantee. In almost every home purchase a title examination, performed by an attorney, is a prerequisite for a loan, with the price for that examination fixed by the minimum fee schedule system established and operated by respondents.

Therefore, petitioners submit that, no matter whether a verbal formula is used, or the facts of this case are analyzed as a whole, the requisite effect on interstate commerce has been proven. Given the interstate aspects of the home acquisition and home financing markets for Northern Virginia, there can be little doubt that Congress could constitutionally have prohibited these price-fixing arrangements had it done so specifically. Accordingly, the Sherman Act is broad enough to cover them, and the requirement of commerce among the several States has been met by petitioners.

III. THE CONDUCT OF THE RESPONDENT VIRGINIA STATE BAR IS NOT IMMUNIZED FROM LIABILITY UNDER THE ANTITRUST LAWS BY THE DOCTRINE OF *PARKER V. BROWN*

In 1962 and again in 1969 the State Bar published Fee Reports which recommended that local bar associations adopt minimum fee schedules (Exhibits 26 and 27, A 19-28). Those Reports also contained suggested schedules for each locality, and those suggestions were generally adopted by the local bar associations with only minor revisions. In addition, the State Bar issued Opinions 98 and 170 stating that any attorney who habitually fails to follow a suggested minimum fee schedule issued by a local bar association is subject to disciplinary action (Exhibits 30 and 31, A 45-48). Throughout these proceedings the State Bar has defended its issuance of these Reports and Opinions primarily on the ground that its activities are immune from the antitrust laws under the "state action" doctrine enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioners contend that *Parker v. Brown* does not grant immunity in the instant case because the State Bar, contrary to its principal contention, is not automatically immune from antitrust liability because it is an agency of the Commonwealth of Virginia for certain limited purposes. Furthermore, we submit that the majority below erroneously concluded that these activities of the State Bar were authorized by the Virginia legislature and actively supervised by the Virginia Supreme Court, both of which must occur before there is immunity under *Parker*. Finally, petitioners contend that, based upon the undisputed facts in the record, most of which were stipulated by the parties, the State Bar's participation in these antitrust violations cannot properly be deemed a "minor" one as the dissenting judge and the trial

court concluded. After discussing the salient features of *Parker v. Brown* in some detail, petitioners will examine each of these rationales for holding the State Bar immune and demonstrate their inapplicability.

A. The Decision In *Parker v. Brown*

In *Parker v. Brown*, the plaintiff sought to challenge a directive of the California Agricultural Prorate Advisory Commission which limited his right to market raisins to an amount below that which he could otherwise sell. The directive was issued pursuant to a broad State-controlled regulatory scheme which had as its statutorily stated purposes to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products" by restricting competition. 317 U.S. at 346 quoting Section 3 of the California Agricultural Prorate Act, Chap. 754, Statutes of California of 1933, as amended (the "Prorate Act"). The California legislature, which had concluded that marketing restrictions were necessary to control the production and sale of certain agricultural products, authorized the establishment of marketing programs and included in the requirements for such programs an elaborate procedure under which State officials played a central and decisive role in approving them.

Thus, the statute provided that upon a petition by ten producers, the State-created Agriculture Commission could schedule a hearing to determine whether a marketing program should be instituted.[47] If it found on the basis of

[47] The Commission was composed of nine persons, one of whom was the State's Director of Agriculture. The others were appointed by the Governor, with the consent of the Senate, for a period of (continued)

the facts before it that an agreement would prevent economic waste and conserve the agricultural wealth of the State, without permitting unreasonable profits to producers, the Commission was authorized to grant a petition. 317 U.S. at 346. Thereafter, a Committee, which could include handlers and packers, would be appointed to prepare a detailed program, which was then scrutinized at another public hearing. Next, the Commission had to approve the plan (or approve it with modifications) if it found that it is "reasonably calculated to carry out the objectives of this Act." 317 U.S. at 347, quoting section 15 of the Prorate Act. If Commission approval was given, then the program was voted upon in a referendum of producers, of whom 65%, owning at least 51% of the crop acreage, had to approve before it became effective. Once such a program was approved, it had to be followed by all producers, with failure to adhere punishable as a misdemeanor. In short, once the program was put in effect, competition in a particular agricultural product was eliminated, and all producers were subject to severe marketing restrictions.

In *Parker*, just such a program was approved for California raisins, which comprise almost all of the U.S. raisin consumption and nearly half of the world crop. The drastic selling limitation on producers was assumed to violate the

[47] (continued)
four years. Six of the members were required to be actively engaged in the production of agricultural commodities, but no more than one member could represent any single commodity. Of the remaining positions, one was to be filled by a commercial handler of agricultural products and the other by a consumer representative. See Section 3 of the Prorate Act, as amended, reproduced in Appendix A to the Supplemental Brief of Appellants in this Court in *Parker v. Brown, supra*, No. 46, October Term, 1942.

antitrust laws, unless the program was immune because it was imposed pursuant to a State statute with the approval of State officials. This Court held that the program did not violate the antitrust laws, noting that it "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activity directed by its legislature." 317 U.S. at 350-51. In concluding that Congress never intended to bring within the Sherman Act activities carried out under the direction of a State, this Court emphasized that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . ." 317 U.S. at 351. It further observed that it is the State which has "created the machinery for establishing the prorate program . . . [which must be] approved by the Commission . . . [and by a] referendum by a prescribed number of producers" 317 U.S. at 352. Based upon all these factors, this Court concluded that the implementation of a statutorily directed marketing program was outside the ambit of the Sherman Act.

This Court has not had occasion to apply *Parker* directly in the more than thirty years since the decision. However, in a case involving the role of the Canadian government in conjunction with the activities of certain U.S. defendants, this Court rejected a claim of an exemption based solely on the fact that the Canadian government was involved in the transaction. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In doing so, it referred to *Parker* as a case of "mandatory" state regulation and

emphasized that there was no evidence in the case before it that the Canadian government "approved or would have approved of joint efforts to monopolize." 370 U.S. at 706. Similarly, in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951), this Court referred to *Parker* as a case involving a situation "when a state *compels* retailers to follow a parallel price policy [and] *demands* private conduct which the Sherman Act forbids" (emphasis added).

Although this Court in *Parker* did not fully spell out the rationale for its holding, the lower courts, with the notable exception of the Fourth Circuit in this case and in its predecessor,[48] have applied *Parker* sparingly in order to harmonize it with the antitrust laws so that the protections afforded by the Sherman Act are not significantly undercut. *See, e.g., Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1367 (10th Cir. 1972). As the First Circuit stated in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30, *cert. denied*, 400 U.S. 850 (1970):

> Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.

In our view, the focus on a State's determination to trade the benefits of unfettered competition under the antitrust

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[48] *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (1971). The Fifth Circuit specifically declined to carry *Parker* to the extent that was done in *Washington Gas Light*. See *Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135, 1140 (1971), *cert. denied*, 404 U.S. 1062 (1972).

laws for other forms of protecting the public interest is the keystone of applying *Parker* correctly. Here the lower courts failed to insure that the activities of the State Bar were adequately supervised by the State and that the public was protected as it was in *Parker*, and thus they were in error.

B. The State Bar Is Not Entitled to Immunity On Account Of The Limited Functions It Performs As An Agency Of The State

It is with this analysis of *Parker-Brown* in mind that we shall examine each of the three bases on which it is contended that the activities of the State Bar are immune from antitrust liability. The principal contention of the State Bar itself is that because it is an agency of the Commonwealth of Virginia, its activities are entirely exempt from scrutiny under the antitrust laws (see *e.g., Motion of State Bar to Dismiss*, p. 6). In the first place, the statute relied on by the State Bar, Virginia Code, section 54-49 (Ad. A, p. 1), provides merely that the Virginia Supreme Court may organize the State Bar "to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court . . . ." Thus, to the extent that the State Bar is an administrative agency of the Virginia Court, it is so only for the limited purposes described in section 54-49 and not for all purposes. The absence of a direct connection with the State, as a formal State agency would have, is further evidenced by the fact that pursuant to section 54-52 of the Virginia Code, the funds for the operation of the State Bar are derived entirely from dues paid by lawyers and may be spent solely for purposes of operating the State Bar.

The only authority supporting the absolutist position taken by the State Bar, *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), not only is clearly distinguishable on its facts, but much of its language and analysis supports petitioners here. The issue in *American Petrofina* was whether a State was a "person" within sections 1 and 2 of the Sherman Act, and the Ninth Circuit, relying heavily on *Parker*, concluded that under no circumstances could a State itself be held to violate those provisions. Thus, if petitioners had sued the Commonwealth of Virginia, or perhaps even the Virginia Supreme Court, the *American Petrofina* decision might support a refusal of the courts to make a further determination as to whether the actions challenged were legislatively mandated and adequately supervised.[49]

But the suit here is against the State Bar not the State itself, and hence even under *American Petrofina* further analysis is required. The Court there specifically noted that in cases involving a "state created corporation intended to manage a monopoly in the public interest" – almost a

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[49] Even this result is not certain since, as the Ninth Circuit recognized in *American Petrofina*, 501 F.2d at 370-371, the Court of Appeals for the District of Columbia Circuit has held that governmental agencies are not automatically immune under the antitrust laws, *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (1971), *cert. denied*, 404 U.S. 1047 (1972). That Court characterized the absolutist position as a ". . . much too talismanic approach where scrupulous distinctions are called for." *Id.* at 934. In its view the inquiry must be " . . . to what extent is the state action permissible as not contravening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power." *Id.* at 935. See also *Norman's On the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1017 (3rd Cir. 1971).

precise description of the State Bar – it is essential ". . . to determine whether the anti-competitive result actually is a goal of the state entitled to a state's immunity rather than a private group masquerading under the banner of 'state action.'" 501 F.2d at 369. Unlike *American Petrofina*, where only State officials were involved, the State Bar here is comprised entirely of attorneys who are seeking an antitrust exemption under "the banner of 'state action'" in order to be able to fix the fees charged to the public and thereby enrich themselves. Other than the fact that officials of the State Bar may perform certain tasks on behalf of the Virginia Supreme Court in connection with violations of the Court's ethical rules (section 54-49, Ad. A, p. 1), the differences between this case and *American Petrofina* could hardly be greater.

A similar comparison with the independent State agency in *Parker* also demonstrates the error in the State Bar's position. The California Agricultural Commission in *Parker* included the State's Director of Agriculture, a commercial handler of agricultural products, and a consumer representative; of course, no such comparable representation is provided on the State Bar. Among the six representatives of the farming industry, each of whom had to be nominated by the Governor and confirmed by the Senate, no more than one could be from the segment of the industry that was being regulated by a particular program. Thus, quite apart from the other procedures and statutory requirements that had to be met, the Commission which rendered the key decisions was broadly based and not composed entirely of those in whose own self-interest it was to restrict competition. Moreover, in *Parker* this Court did not rely solely on the Commission's connection with the State, but emphasized numerous other aspects of the

program which were intended to insure fairness to all without sacrificing all of the goals of the antitrust laws. As the First Circuit observed in *George R. Whitten Jr. v. Paddock Pool Builders, supra,* the emphasis in *Parker* on "the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption." 424 F.2d at 30. Or, as the Fifth Circuit noted in *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1294 (1971), *cert. denied,* 404 U.S. 1047 (1972), state participation "only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter." Accordingly, it is to this further analysis which petitioners now turn.

C. The Actions Of The State Bar Were Not Authorized By The Virginia Legislature And Not Specifically Approved By The Virginia Supreme Court, Both Of Which Are Required To Obtain Immunity Under *Parker v. Brown*

In sustaining the District Court's holding that the Virginia State Bar was exempt, the majority in the Court of Appeals found that participation by the Virginia Supreme Court in the minimum fee schedule arrangement created the antitrust immunity for the State Bar.[50] We do not dispute that in certain circumstances certain actions taken by the Virginia Supreme Court, pursuant to a legislative

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50 As noted previously (*supra,* p. 18), the majority, like the dissent and the trial judge, declined to grant any antitrust immunity to the respondent Fairfax County Bar Association on account of any activities of the Virginia Supreme Court.

directive, might provide antitrust immunity for actions of the State Bar. It is our position, however, that the Virginia Supreme Court has done nothing to constitute the "active supervision" of the minimum fee schedule system, which the Court of Appeals conceded must exist under *Parker* in order to obtain immunity (App. B, pp. 6, 8 & 11). Thus, the questions to be asked are, did the Virginia legislature authorize the State Bar to issue its 1962 and 1969 Fee Reports and Opinions 98 and 170, subject to supervision by the Virginia Supreme Court, and if so, did that Court specifically approve those Reports and Opinions? Unless the State Bar can establish affirmative answers to both of those questions in their entirety, its *Parker* defense must fail.

1. There Was No "Legislative Command" To The Virginia Supreme Court Comparable To That In *Parker*.

In reaching its conclusion that the activities of the State Bar were immune, the majority purported to find the legislative authorization in sections 54-48 and 54-49 of the Virginia Code (App. B, pp. 8-9). Those provisions authorize the Virginia Supreme Court to adopt rules and regulations defining the practice of law, prescribing a code of ethics, prescribing procedures for disciplining, suspending, and disbarring attorneys, and delegating certain of those powers to the State Bar (See Ad. A, p. 1). From this rather general language, the Court determined that the Virginia legislature had "provided for regulation of attorneys through a code of ethics governing professional conduct" (App. B, p. 9). It also stated that the desired goal of the Code of Professional Responsibility, which was adopted under section 54-48, is to benefit clients and the public in general. From these assertions, it concluded that there was a legislative

purpose to protect the public which met the requirements of the legislative directive in *Parker*.[51]

In our view the statutory directives in this case are so fundamentally different from those in *Parker* that the Court of Appeals should have ruled against the claim of immunity on that ground alone. For instance, in *Parker* there was a specific legislative determination to restrict competition by the implementation of the prorate programs in order to conserve agricultural wealth and prevent its waste in California. See *Gas Light Co. of Columbus v. Georgia Power Co., supra,* 440 F.2d at 1135. There is nothing in the general language of the statutes involved in regulating attorneys in Virginia that indicates any kind of concern with restricting competition, let alone a conscious decision to do so in order to achieve other public benefits. In fact, one provision of the Virginia Code – section 54-51, Ad. A, p. 2 – specifically forbids the Supreme Court from issuing ethical rules which are "inconsistent with any statute . . ." The statute in *Parker* also specifically required a finding that the proposed program would prevent waste and conserve the agricultural wealth and, most importantly, that such ends would be achieved without permitting unreasonable profits to be made by the producers. Once again there is

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51 Even if the legislative purpose was to protect the public, the actual purpose of minimum fee schedules is to improve the earnings of the Bar, as evidenced by the Fee Reports themselves (see discussion pp. 8, note 5, and 42-43 *supra*). Moreover, ". . . the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well-intended . . ." *United States v. Topco Associates Inc.,* 405 U.S. 596, 610 (1972).

not the slightest mention of any of these or any similar factors in the Virginia statutes.[52]

Finally, the California Prorate Act required producers to conduct their activities in accordance with the program once it was approved, and the failure to do so was punishable as a misdemeanor. 317 U.S. at 347. It was this mandatory aspect of *Parker* which led to the recent decision in *United States v. Pacific Southwest Airlines,* 358 F. Supp. 1224, 1227 (C.D. Cal), *motion for leave to file writ of certiorari dismissed,* 414 U.S. 801 (1973), in which the Court limited the applicability of *Parker* to legislative action that was *"directed, commanded* or *imposed* (emphasis in original)." See also *Ladue Local Lines, Inc., v. Bi-State Devel. Agency,* 433 F.2d 131 (8th Cir. 1970), where the Court emphasized the legislative mandate in holding the defendant immune under *Parker.* In this case, however, it is apparent that the Virginia legislature has never addressed itself to the question of the desirability of competition among lawyers, let alone has it reached a determination that such competition should not be permitted and that an alternate form of regulation – minimum fee schedules – should be imposed. See *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Comm.,* 263 F.2d 502, 509 (4th Cir. 1959) (*Parker* applies only "[w]hen a state has a public policy against free competition in an industry important to it . . ."). There is simply no basis

52 A specific finding by the North Carolina Supreme Court, pursuant to a statutory directive to it, that the marketing rules and restrictions at issue in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Comm.,* 263 F.2d 502, 508 (4th Cir. 1959), were "fair and equitable", did not preclude a determination that the rules were unauthorized private actions and not exempt under *Parker.*

for concluding that the regulatory power of "democratically controlled legislatures"[53] has been exercised by the Commonwealth of Virginia in this instance to replace the antitrust laws with an alternate form of protecting the public interest.

2. The Virginia Supreme Court Never "Actively Supervised" The Activities Of The State Bar At Issue Here

But even if the Virginia statutes can be read to constitute a direction or authorization to restrict competition among attorneys by the use of minimum fee schedules, there is no support for the majority's conclusion that there was the "active supervision" by independent State officials that is admittedly required to sustain a *Parker* exemption. Although the Court found that it was "doubtful" that the State Bar could constitute the independent body required by *Parker,* it held that the Virginia Supreme Court was sufficiently independent and related to the State, and that it had actively supervised the State Bar on the matter of minimum fee schedules so that it satisfied *Parker* (App. B, p. 11).

However, the supervision exercised by the State Agricultural Commission in *Parker* had a number of features to it, none of which is present in this case. In *Parker* the processes leading to implementation of a marketing program began only with a petition by ten producers to the Commission, which would determine whether to proceed to the next step which was to hold a public hearing on the proposal. Thereafter, the Commission itself had to make the

53 *Northern California Pharmaceutical Ass'n v. United States, supra,* 306 F.2d at 386.

requisite statutory findings before it could appoint a committee to recommend the specific program to be established. That program thereafter underwent scrutiny in another public hearing, and the Commission again had to make a finding that the program met the statutory mandates. It was only after these procedures were met, and an affirmative vote of producers obtained, that the program could be placed into effect.

To be sure, every *Parker* exemption need not contain each of these procedural safeguards, nor is there any reason to suppose that there is a requirement for any specific form of approval and supervision by the requisite State agency. But there must be more than what took place here, where there is not the slightest evidence to suggest that the Virginia Supreme Court gave any active consideration to the merits of 1962 and 1969 Fee Reports or to the Opinions of the State Bar which provided the mechanism for enforcing adherence to the fee schedules of the local bar associations. The only indications that the Supreme Court was aware of the existence of fee schedules are the statements contained in the ABA's Canons of Professional Ethics and Code of Professional Responsibility, which were adopted almost verbatim by the Virginia Supreme Court (see page 9, *supra*). Thus, Canon 12 of the now repealed Canons of Professional Ethics stated that "in determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee" (App. A, p. 9). In addition, Ethical Consideration 2-18 of the Code of Professional Responsibility, which became effective in Virginia on

January 1, 1971, provides that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees" (App. A, p. 9). It is from these two passing references to minimum fee schedules, rather than any specific approval of the Opinions or Fee Reports by the Supreme Court, that the majority of the Court of Appeals concluded that "[t]he active independent state supervision required in *Parker* is provided here by the Virginia court" (App. B, p. 11).[54]

In reaching that result, the court below relied heavily on its prior opinion in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F.2d 248 (4th Cir. 1971). There, confronted with a silence on the part of the Virginia Utility Commission similar to the inaction of the Virginia Court in this case, the Fourth Circuit concluded that it was not necessary to equate silence with abandonment of the duty to supervise and that it is "just as sensible to infer that silence means consent, i.e., approval." *Id.* at 252. We respectfully suggest that to permit approval to be manifest by silence would wholly eviscerate the "active supervision" requirement of *Parker*, and is unwarranted both in terms of the facts and language of *Parker*. See *United States v. Oregon State Bar*, *supra*, Ad. B, p. 12; Note, 85 Harv. L. Rev. 670 (1972). The most that can be said for the way in which the Virginia Court supervised the State Bar's role in the

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54 The majority also claimed that the Virginia court has employed minimum fee schedules in setting fees, and offered this as further judicial approval of them. There is no citation to any such action by a Virginia court, and there is nothing in the record to sustain that contention. But even if it were factually correct, it would not constitute the kind of supervision required under *Parker*. See *United States v. Oregon State Bar*, *supra*, Ad. B, p. 9.

fee schedule arrangement is that "the regulatory scheme is one of general supervision rather than one of specific direction" and hence does not confer antitrust immunity. *Marnell v. United Parcel Service of America, Inc.*, 260 F. Supp. 391, 409 (N.D. Cal. 1966).

In fact, in a case in which the defendants claimed antitrust immunity under a federal statute which required the approval of the Secretary of Agriculture, this Court denied the immunity because there was no more than ". . . inaction, or limited action, of the Secretary . . ." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). The approval required in *Borden* is, we submit, the functional equivalent of the "active supervision" requirement in *Parker*, and hence the Court of Appeals was in error in equating silence with authorization.[55] The very general supervision exercised by the Virginia Court over the State Bar does not confer an across-the-board immunity to the Bar

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[55] On October 15, 1974, this Court heard argument in *Jackson v. Metropolitan Edison Co.*, No. 73-5845, in which the petitioners contend that the action of a utility in cutting off service to non-paying customers, without affording them a hearing, is sufficiently the action of the State to come within the Fourteenth Amendment's due process requirements. The lower court ruled that there was no state action because the State utility commission had done nothing other than to accept for filing the regulations which authorized the immediate cut-off, and that hence the action was private and not subject to the Fourteenth Amendment. 483 F.2d 754 (3rd Cir. 1973), *cert. granted*, 415 U.S. 912 (1974). The anomaly of the utility's claim of a "state action" antitrust exemption based on silence while at the same time maintaining the absence of "state action" for due process purposes based on a similar silence, has not gone unnoticed. See *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 662 (7th Cir. 1972) (*en banc*), *cert. denied*, 409 U.S. 1114 (1973).

from the antitrust laws since, as this Court observed in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 559, (1944), the fact that States are regulating an industry is itself no reason to suppose that Congress intended to imply an antitrust exemption for that industry. As Chief Justice Stone noted, Congress was well aware that railroads were subject to pervasive federal and state regulation, and yet their activities are clearly subject to the antitrust laws. *Id.* Obviously, Congress realized that lawyers have long been regulated in some respects by the courts of their State, but that should not suppose an intent to exempt them from the antitrust laws for that reason alone.

There can be little doubt that Judge Craven in his dissent was correct when he stated that "I think [the Virginia Supreme Court] will be surprised to learn that it is engaged in *active* supervision of the State Bar's implementation of minimum fee schedules in Virginia. I find nothing in the record to suggest that the Virginia court even knew that Fairfax County Bar Association had a minimum fee schedule, or that it approved it either directly or indirectly through the State Bar." (App. B, p. 21, emphasis in original). Accordingly, the contrary position of the majority cannot be upheld.

D. The Role Of The State Bar In The Operation Of The Minimum Fee Schedule System Was Not "Minor"

There remains only the argument advanced by Judge Craven in his dissent that the State Bar should not be held liable for its "minor role" in these activities (App. B, p. 21). For this proposition, Judge Craven cited that portion of

this Court's decision in *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 494-496 (1950), which sustained a lower court determination that the National Association and its Executive Vice President were not participants in the price fixing conspiracy charged in the complaint. In actuality, this Court simply found that the trial court's factual finding, that those two persons had no responsibility for the alleged price fixing violations, was not clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. This Court said that it was "left somewhat in doubt as to the extent if any to which the National Association and [its Vice President] were architects of the fee fixing conspiracy or participated in it." *Id.* at 495. Based on what it concluded was "a somewhat attenuated relationship," *id.* at 495, the Court declined to overrule the trial court's determination of nonliability as to those two persons.

If the District Court here had found as a fact that the State Bar had a "minor role" in the establishment and operation of the minimum fee schedule system, then the situation would be comparable to the *Real Estate Board* case, and we could sustain our challenge only by meeting the "clearly erroneous" test rule of Rule 52(a). But that is not the case here for, although the District Court characterized the participation of the State Bar as a "minor role in this matter" (App. A, p. 6), that assertion cannot be read as a factual finding given its context and the failure to include it in the detailed findings of fact that the Court did make. Moreover, even if it had made such a finding, it would be "clearly erroneous." See *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948).[56]

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56 *But compare United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952) (appellate court will not set aside finding (continued)

The District Court specifically found that there was a "significant degree of adherence" to the minimum fee schedule for title examination charges (Finding 6, App. A, p. 8) and agreed with the stipulation of the parties that the issuance by the State Bar of Opinions 98 and 170 was a "substantial influencing factor" in the relationship between the fees charged and those listed in the minimum fee schedule (Stip. ¶ 20, App. A, p. 19). There simply would have been no basis for concluding that the State Bar, in threatening to bring disciplinary proceedings against anyone who did not adhere to the fee schedules, played only a "minor role" in this matter.[57] In addition, it is apparent that the issuance of the Fee Reports led directly to the issuance of the local fee schedules (Stip. ¶15, App. A, p. 18). In particular, the "scaling up of fees for legal services" suggested in the 1969 Fee Report (Exhibit 27, p. 3, A 25), was followed almost immediately by increases in the fees contained in the schedules of the local bar associations to make them comparable to those recommended by the State Bar in its Fee Report.[58]

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56 (continued)
in case with "a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."

57 The majority in the Court of Appeals seemingly agreed with this view of the role of the State Bar since it stated that "the fee schedule and the enforcement mechanism supporting it" act as a substantial restraint on competition (App. B, p. 13).

58 Contrary to the assertion made in note 3 in the State Bar's Motion to Dismiss in the Court, there is relatively little difference between the fee schedule as adopted in Northern Virginia for title examinations (Exhibit 29, p. 25, A 40) from that in the 1969 Report (Exhibit 27, p. 11, A 26). Thus, there is a difference of no more (continued)

The issuance of the Fee Reports, the promulgation of the two Opinions, and evidence such as the letter from one attorney who indicated that he was "ethically required" to follow the fee schedule (Exhibit 9), leave little room for doubt that the State Bar played a significant, not a minor role in obtaining adherence to the minimum fee schedule of the Fairfax Bar Association. There is no *de minimus* role in an antitrust conspiracy, and it is apparent that the State Bar is also responsible for the operation and establishment of the minimum fee schedule system in Northern Virginia, and hence its conduct violated the Sherman Act.

E. The Reluctance With Which This Court Has Implied Exemptions From The Antitrust Laws Where Federal Regulatory Agencies Are Involved Further Demonstrates The Error Of The Court Of Appeals

The view that petitioners have taken of the *Parker* exemption is that it is a narrow one, which is available only where the legislature has decided that other forms of meaningful State regulation should supplant the protection afforded the public by the antitrust laws. Although this

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58 (continued)
than $25 for the minimum charge for any title examination and that difference pertains only to purchases of homes less than $10,000, a rarity indeed today in Northern Virginia. The only other difference is for those homes between $100,000 and $1,000,000, also an insignificant number of transactions. See also Finding 12 of the District Court (App. A, p. 9) where the judge concluded that the 1969 Fee Report and the 1969 Fairfax fee schedule are "essentially identical" for title examination charges.

Court has not had occasion to apply *Parker* in any subsequent cases, it has ruled in a number of recent cases where exemptions were sought from the antitrust laws on account of federal regulatory statutes. In every instance it has stated that such exemptions are to be granted with great reluctance since ". . . the antitrust laws represent a fundamental national economic policy . . ." *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966). Although the specific issue in most of those cases was whether the existence of a federal regulatory statute implied a partial or total repeal of the antitrust laws, the inquiry is similar to that in a *Parker* case: did Congress intend to exclude from the antitrust laws the particular activities at issue, in light of the legislative determination that an alternate form of regulation ought to replace or limit competition? Thus, the authors of a recent article discussing the *Parker* defense found that "[t]he judicial approach in the modern state action cases is correspondingly analogous to that which has been more fully developed in the federal regulatory area," E.W. Kintner and D.C. Kaufman, *The State Action Antitrust Immunity Defense*, 23 Am. U.L. Rev. 527, 537 (1974). They therefore concluded that " . . . it would seem appropriate to view state action immunity in the same light as the implied exceptions which may flow from federal regulation." *Id.* at 544.

The test which this Court has established to cover claims of implied exemptions is set forth in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963):

> Repeals of the antitrust laws by implication from a regulatory statute are *strongly disfavored*, and have only been found in cases of *plain repugnancy* between the antitrust and regulatory provisions. 374 U.S. at 350-51 (emphasis added).

That test has been repeatedly applied in all of the recent cases which this Court has decided on that question. See *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372 (1973), and the decisions cited therein.[59] In discussing this issue in *Otter Tail,* this Court issued a warning that the majority below should have, but failed to heed:

> When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. *Id.* at 374.

See also *United States v. Radio Corporation of America,* 358 U.S. 334, 351 (1959). Moreover, in cases like the instant one where a broad claim of exemption was made, this Court has rejected that type of claim, holding instead that an exemption would be available ". . . only if necessary to make the [regulatory] Act work and even then only to the minimum extent necessary" *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963).[60] The reason

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59 While the results in a number of these cases have provoked sharp dissents, the differences have been on the applicability of the relevant statutes to the operative facts, not on the standard to be applied. *See, e.g., Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973) (finding an exemption), and *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963) (declining to find one).

60 This discerning analysis of the particular provisions of the statute at issue points up the error of the Court of Appeals when it stated that it was "manifestly unfair to dissect a state's regulatory program into its various component parts . . . and then to declare . . . [some parts of] the program . . . outside the *Parker* exemption" (continued)

for this reluctance to grant antitrust immunity is generally that "[t]here is nothing built into the regulatory scheme which performs the antitrust function of insuring that [the defendant] will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. And in one of the few cases finding that a federal statute pre-empted the antitrust laws, this Court noted that the specific provision relied on ". . . was designed to bolster and strengthen antitrust enforcement." *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 307 (1963). Obviously, no such antitrust considerations are part of Virginia's program of regulating attorneys.

There is also one statutory exemption from the antitrust laws which provides further support for petitioners' view that *Parker* should be applied on a limited basis. That is the McCarran-Ferguson Act which was passed almost immediately after this Court held in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), that the business of insurance was subject to the antitrust laws. That Act, now codified at 15 U.S.C. §§ 1011-1013, was directed both at the problem of assuring that valid State laws were not considered to be pre-empted by Congressional statute and, of particular relevance for this case, at providing an exemption from the antitrust laws for the business of insurance, except "to the extent that such

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60 (continued)
(App. B, p. 10). See also *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 385 n. 14 (1973), where the Court stated that ". . . a statutory scheme that does not create a total exception from antitrust laws . . . may, nonetheless, in particular and discrete instances by implication grant immunity from an antitrust claim."

business is not regulated by state law." 15 U.S.C. §1012 (b). The existence of this provision suggests that Congress, writing less than two years after this Court's decision in *Parker*, concluded that a general regulatory scheme of State control of insurance companies would not be sufficient to exempt them from the antitrust laws under *Parker*, and hence a specific statutory provision to that effect was required. As two commentators have expressed it, " . . . if general state-agency supervision is sufficient to remove the supervised industry from the operation of the antitrust laws, the McCarran-Ferguson Act was a waste of congressional time and energy." E.W. Kintner and D.C. Kaufman, *The State Action Antitrust Immunity Defense*, 23 Am. U.L. Rev. 527, 535 (1974).[61]

This Court warned in *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962), that "[i]mmunity from the antitrust laws is not lightly implied." In fact, in every case finding immunity based upon a federal regulatory scheme, this Court has found either specific approval of the action or a pervasive federal regulatory scheme governing industry competition intended to pre-empt the field.

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61 Moreover, even when Congress has enacted legislation intended to provide an exemption from the antitrust laws, this Court has construed the language narrowly. See *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Congress responded to *Schwegmann* by amending the exemption statute, but again the exemption was challenged as being insufficiently broad. Finally, this Court in a 6-3 decision in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), concluded that the amendment had been sufficiently broad to sustain the practices being challenged, although in reaching that result it emphasized that even statutory exemptions must be strictly construed. *Id.* at 316. See also *Federal Maritime Comm. v. Seatrain Lines*, 411 U.S. 726, 733 (1973).

Yet it is readily apparent that neither of those conditions was met by the Virginia Supreme Court's role in its regulation of the State Bar's activity relating to minimum fee schedules. Therefore, under the standards applied in federal cases, no exemption would be implied in this particular situation.

Just as this Court has been reluctant to conclude that Congress intended to imply a repeal of the antitrust laws where federal regulatory statutes are involved, we suggest that there should be even greater reason for caution with regard to State programs, since the Court is being asked to rule that Congress would have intended such programs be exempt when it had no control over them. There is simply no basis to conclude that Congress would have wanted to allow the States greater legislative leeway to exempt conduct from the antitrust laws than it was exercising itself under federal regulatory statutes. Thus, in this case respondents are engaged in the practice of a legally protected monopoly, and yet if their conduct is exempt under *Parker*, there is no price protection for the public comparable to the price competition guaranteed by the antitrust laws. Accordingly, this Court should be extremely hesitant to assume that Congress intended to allow the States to override the fundamental national economic policy of the Sherman Act with no standards for doing so, with no assurance of protection of the public, and with no active role being played in the approval of the conduct at issue by truly independent State officials. However broad the reach of *Parker v. Brown* may be, it is apparent that it is nowhere near extensive enough to bring within its ambit the purely private, unsupervised activities of the State Bar which are challenged here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be reversed and the case remanded to it for further proceedings in which it should consider the Eleventh Amendment defense raised by the respondent Virginia State Bar and the claim that relief should be prospective only, advanced by the respondent Fairfax County Bar Association.

Respectfully submitted,

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December 20, 1974

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* The extensive assistance of Tova Indritz, Yale Law School, 1975, is gratefully acknowledged.

ADDENDUM A

Relevant Statutes Relating to the Virginia State Bar Virginia Code 1972 Repl. Vol.

§54-48. *Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

(a) Defining the practice of law.

(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

§ 54-49. *Organization and government of Virginia State Bar.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.

§54-50. *Fees.*– The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations fixing a schedule of fees to be paid by members of the Virginia State Bar for the purpose of administering this article and providing for the collection and disbursement of such fees; but the annual fees to be paid by an attorney at law shall not exceed the sum of thirty-five dollars.

§54-51. *Restrictions as to rules and regulations.*– Notwithstanding the foregoing provisions of this article, the Supreme Court of Appeals shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys at law, which shall be inconsistent with any statute; . . . .

§54-52. *State Bar Fund; receipts; disbursements.*– The State Bar Fund is continued as a special fund in the State treasury. All fees collected from the members of the Virginia State Bar as provided in § 54-50 shall be paid into the State Treasury immediately upon collection and credited to the State Bar Fund. All moneys so paid into the fund are hereby appropriated to the Virginia State Bar for the purpose of administering the provisions of this article. All disbursements from the fund shall be made by the State Treasurer upon warrants of the Comptroller issued upon vouchers signed by such officer or officers of the Virginia State Bar as may be authorized, by or in accordance with rules and regulations prescribed, adopted and promulgated by the Supreme Court of Appeals, so to do.

None of the funds derived hereunder shall be devoted to publishing decisions of the Supreme Court of Appeals or to law magazines or to buying any such publications nor to the establishment of a clients' security fund.

ADDENDUM B

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[November 22, 1974]

UNITED STATES OF AMERICA, Plaintiff,	)	CIVIL NO. 74-362
v.	)	DECISION AND ORDER
OREGON STATE BAR, Defendant.	)	

The United States brings this civil action to enjoin the Oregon State Bar from further publication, distribution or suggestion of a schedule of attorneys' fees. The complaint is filed and jurisdiction obtained under Section 4 of the Sherman Act, 15 U.S.C. § 4, alleging violation of Section 1 of the Act, 15 U.S.C. § 1. The Government alleges that defendant and various of its members and officers are engaged in an illegal conspiracy to fix prices. Only the Oregon State Bar is made a defendant to this suit.

The defendant moves for summary judgment pursuant to Fed. R. Civ. P. 56, asserting two legal defenses. First, defendant argues that the "state action" doctrine exempts its activities from Sherman Act scrutiny. Second, defendant claims that its activities are immune from antitrust suit by the "learned profession" exemption to the Sherman Act "trade or commerce" requirement.

The applicability of these two special exemptions is the only issue raised by defendant's motion. The Sherman Act validity of the fee schedule itself, viewed without regard to special exemptions, is not before the Court. The parties do not dispute any facts material to this motion.

In 1935 the Oregon legislature passed an act providing that all lawyers in the state must be members of the Oregon State Bar "which hereby is created an agency of the state to carry out the provisions of this Act." Ch. 28, Oregon Laws of 1935. Under the act as amended to date the Oregon State Bar is "a public corporation and an instrumentality of the Judicial Department of the government of the State of Oregon." O.R.S. 9.010.

A Board of Governors, elected by the membership, "is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice." O.R.S. 9.080. The Board of Governors is empowered, with the approval of the State Bar, to formulate rules of professional conduct; and when such rules are adopted by the Supreme Court, the Board has the power to enforce them. O.R.S. 9.490. Pursuant to this authorization, the Board of Governors formulated a Code of Professional Responsibility which was adopted by the Oregon Supreme Court on December 30, 1970, effective that date.[1] Canon 2 of the Code states:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

Disciplinary Rule 2-106, which accompanies this canon, provides:

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[1] With one exception not here relevant, this Code is identical to the Code of Professional Responsibility adopted by the American Bar Association on August 12, 1969, effective January 1, 1970.

"DR2-106 FEES FOR LEGAL SERVICES.

(A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) *The fee customarily charged in the locality for similar legal services.*

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." (Emphasis supplied)

The State Bar is charged with the responsibility of investigating complaints as to the conduct of attorneys and filing its recommendations with the Supreme Court. The Supreme Court, after notice and hearing, may affirm, adopt, modify, reverse or reject a recommendation; and may disbar, suspend or reprimand the attorney for breach of the statutory duties or the Code of Professional Responsibility. O.R.S. 9.541 - .580.

On June 1, 1969, the Oregon State Bar published and distributed to its members a "Schedule of Minimum Fees and Charges." This schedule was prepared by the Bar's Committee on Economics of Law Practice. The duties and responsibilities of this committee are not defined by statute nor by bylaws of the Bar.

On April 1, 1973, the Oregon State Bar published and distributed to its members a "Schedule of Suggested Fees and Charges." This schedule was a revision of the 1969 schedule made by various permanent employees of the Bar.

Both the 1969 and 1973 schedules were adopted and approved by the Board of Governors. Neither schedule was adopted or approved by the Oregon Supreme Court nor by the Oregon State Legislature.

I. THE "STATE ACTION" DOCTRINE

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . . ."

While "[i]mmunity from the antitrust laws is not lightly implied," *California v. Federal Power Commission*, 369 U.S. 482, 485 (1962), an exemption from antitrust law coverage for the activities of a state was carved out by the Supreme Court thirty-one years ago. *Parker v. Brown*, 317 U.S. 341 (1943). The defendant in the instant case argues that this state action doctrine exempts its activities from Sherman Act attack.

The dimensions of this state action exemption have never been clear. Much of the language in *Parker v. Brown, supra*, generates confusion rather than clarification. Thus, while the Court exempts "state action or official action directed by the state," it declares that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.

The line between immunity and illegality can be made less uncertain by an examination of the facts in *Parker*. In that case, a producer and packer of raisins challenged the raisin proration marketing program established pursuant to the California Agricultural Prorate Act. The program severely restricted the free marketing of raisins. Several factors figured significantly in the Court's analysis. First, the California Agricultural Prorate Act specifically authorized the establishment of proration marketing programs which would restrain competition and maintain prices. Second, although private producers were involved in the petition for, formulation of, and administration of the program, the

program was not effective until approved by a state commission following at least two public hearings. This commission was composed of the state Director of Agriculture and eight gubernatorial appointees. Third, the Court found that the California scheme dovetailed with the federal Agricultural Adjustment Act, which authorized the Secretary of Agriculture to impose similar marketing restrictions and which recognized the existence of state programs.

Thus, the Court stated, 317 U.S. at 350-51:

> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

The most recent discussion of *Parker v. Brown* is found in *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974), where the court concluded that if a state itself is the defendant in an antitrust suit, no further analysis is required before dismissing the claim pursuant to the state action doctrine. However, when the state is not the

named defendant, the court must engage in a comprehensive examination of the legislative will. The court stated, at pp. 369-70:

> "But these cases [in which the state itself is not the defendant] involved suits against allegedly private defendants who defended on the basis that the state has authorized their anti-competitive conduct. The alleged authorization is normally either a putative regulatory scheme or a state created corporation intended to manage a monopoly in the public interest.
>
> "In either situation, it is necessary to determine whether the anti-competitive result actually is a goal of the state entitled to the state's immunity rather than a private group masquerading under the banner of 'state action.' Such a determination necessarily involves an inquiry into legislative motives, and courts are understandably reluctant to apply the state's immunity to private parties without a clear indication by the state's legislature that the anti-competitive results have its sanction.
>
> "But there is no indication from those cases that the legislature must declare its intent to supplant competition in an industry when there is no question that the conduct is committed by the state. Since the suit here is directly against the state, there can be no such question, and the *Whitten* analysis is inapplicable. The 'legislative mandate' test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is

no doubt that the defendant is the state, the 'legislative mandate' analysis is unncessary.

"This conclusion comports with the reliance in *Parker* upon a 'legislative mandate.' After declaring that the Sherman Act is inapplicable to states, the Court seemingly turned to the question whether the plan was really the act of the state, noting that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' From what follows in the Court's opinion, it appears that the Court was responding to the obvious point that since the Commission was comprised of industry leaders and the plan was formulated by industry representatives, the plan was nothing more than a private agreement diguised as state action. It was apparently to this obvious objection that the Court responded when it relied upon the legislative regulatory policy and the fact that the commissioners were gubernatorial appointees. Thus, the Court was merely relying on the legislative mandate to conclude that the plan was the product of the state; it did not conclude that state action is immune from antitrust liability only when directed by the legislature as part of an anticompetitive regulatory scheme." (footnotes omitted)

In the instant case, the defendant is not the state of Oregon, but is a public corporation and an instrumentality of the Judicial Department. Since the defendant is comprised

of private attorneys, and since the fee schedule is formulated by private attorneys, the *Parker* "legislative mandate" test must be applied to determine whether the fee schedule promulgated is the action of the state.

There is no Oregon statute specifically authorizing the promulgation of an attorneys' fee schedule; nor, of course, is there a federal statute explicitly recognizing or implicitly authorizing the formulation of such fee schedules. In addition, the fee schedules published and distributed by the defendant were neither debated in public hearings nor approved by a disinterested state commission. In short, there is not the substantial state direction and involvement required to meet the legislative mandate requirements and to elevate these Oregon State Bar activities to the plateau of "state action" immunity.

Defendant argues vigorously that invalidation of fee schedules would threaten the ethical structure of the legal profession, noting the prohibition on "clearly excessive" fees in DR2-106, Code of Professional Responsibility. It also cites several cases which refer to fee schedules in the determination of reasonable fees, with apparent approval.[2] However, neither the Code of Professional Responsibility nor the cited case law amounts to a "legislative command" that the defendant formulate a fee schedule.[3] The prohibition on "clearly excessive" fees can certainly be enforced

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[2] *See, e.g., Junker v. Junker,* 188 Neb. 555, 198 N.W.2d 189 (1972); *State ex rel. Baker v. County Court,* 29 Wis.2d 1, 138 N.W.2d 162 (1965); *Cox v. State Ind. Accident Comm.,* 168 Or. 508, 123 P.2d 800 (1942).

[3] At oral argument the Government conceded the validity of DR2-106 itself, which has been adopted and approved by the Oregon Supreme

(continued)

without the existence of an official fee schedule, one which does not encompass all types of legal work anyway. A suggested fee schedule has never set a ceiling on attorneys' fees; on the contrary, it has tended to establish a comfortable floor below which such fees need not fall. And the court use of suggested fee schedules is not sufficient to stamp them with the imprimatur of the state legislature.

Other cases have addressed this problem. In *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959), another leading case on the state action doctrine, the Fourth Circuit held that the state action doctrine did not exempt local tobacco boards of trade from the antitrust laws. These boards of trade, authorized by state statute to regulate tobacco auctions, were not supervised in any manner by state officials. The regulations, then, were essentially formulated by private businessmen to govern their own conduct, much as the fee schedules at issue here were formulated by private attorneys for their own use. The value of *Asheville* as authority against the defendant is questionable, though, since the Fourth Circuit distinguished the case in *Goldfarb v. Virginia State Bar,* 497 F.2d 1 (4th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3246 (U.S. Oct. 29, 1974) (No. 74-70).

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), the First Circuit held that the *Parker* exemption does not apply to the action of a public agency

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[3] (continued) Court pursuant to a specific Oregon statute. Neither in briefs nor at argument did either party mention EC2-18, which refers to suggested fee schedules. Apparently, the parties recognize that the Ethical Considerations, unlike the Disciplinary Rules, are not mandatory in character.

in approving specifications for competitive bids. Although the factual context of *Whitten* is significantly different from the case at bar, the following language, 424 F.2d at 30, has been quoted with apparent approval by the Ninth Circuit in *Petrofina, supra,* at 368-69:

> "The [Parker] Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. As one commentator has observed, the assertion that an act is 'valid governmental action * * * suggests inquiry rather than ends it. * * * Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in, and supervision over, the allegedly wrongful private activity.' Comment, Alabama Power Company v. Alabama Electric Cooperative, Inc., 55 Va. L. Rev. 325, 345-346 (1969). Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."

In concluding that the Oregon State Bar activities in question here are not exempt "state action," I have considered carefully the recent Fourth Circuit decision dealing with the validity of attorneys' fee schedules, *Goldfarb v. Virginia State Bar, supra.* That case is a class action brought on behalf of homeowners against the Virginia State Bar and the Fairfax County Bar Association. The court held that the State Bar is exempt from antitrust liability because of

the *Parker* state action doctrine. I am not persuaded by the reasoning of the court.

The *Goldfarb* court read *Parker* as establishing three requirements for exemption of an activity as state action: (1) it must benefit the public; (2) it must be actively supervised by independent state officials; and (3) it must have received its authority and efficacy from legislative command.

First, the court found that the primary benefits of the Code of Professional Responsibility accrue to the public, and that the fee schedule, as part of the same general regulatory scheme, should not be invalidated simply because it also benefits individual attorneys. In my opinion, this reasoning is unsound. Not only is the fee schedule not a part of the Code, but it is not even necessary for the regulation of the bar for public benefit. The fee schedule should be examined apart from the general regulatory scheme; such an examination would disclose little public benefit. *See* Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist,* 3 U.C.L.A. – Alaska L. Rev. 207, 236-43 (1974); Note, *A Critical Analysis of Bar Association Minimum Fee Schedules,* 85 Harv. L. Rev. 971 (1972); Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust,* 1968 Wis. L. Rev. 1237, 1253-58.

Second, the court held that the Virginia state court's inaction with regard to specifically approving or disapproving fee schedules should be construed as active supervision by independent state officials since the court has the authority to regulate the bar. I do not think that such consent by silence meets the *Parker* test. Additionally, the parties thereto stipulated that the Virginia court gave authority

to the State Bar to issue suggested fee schedules. No such authority has been given by the Oregon Supreme Court.

Third, in *Goldfarb* the parties also stipulated that the regulation program received its authority and efficacy from legislative command. No such stipulation exists in the instant case. And even so, reliance on the stipulation in *Goldfarb* begged the question, for the issue was whether the promulgation of fee schedules was authorized by the legislature, not whether the general regulation of attorneys was so authorized.

In sum, the *Goldfarb* case, on which the defendant relies heavily, is unpersuasive; since it is not binding precedent, this court chooses not to follow it.[4]

II. THE "LEARNED PROFESSION" EXEMPTION

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits conspiracies in restraint of "trade or commerce." The

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[4] One final argument by plaintiff should be mentioned. Plaintiff argues that, even if the Oregon legislature has mandated some limitations on competition among attorneys, the defendant must show that its actions constitute the least restrictive alternate available to achieve the desired end. In support of this proposition, plaintiff cites *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), a case which reconciled the Securities Exchange Act with the antitrust laws. The Court held that the powers of self-regulation granted the Exchange did not give it unbridled immunity from the antitrust laws, but only that immunity required to enable the Exchange to achieve the aims of the Securities Exchange Act.

Silver does not involve the state action doctrine. Whether the *Silver* analysis regarding reconciliation of two federal statutory schemes should apply to the instant case is an issue this court does not reach since I conclude that the Oregon legislature has not directed the defendant to limit fee competition.

defendant argues that its activities do not constitute "trade or commerce" because it is engaged in a "learned profession." The existence *vel non* of a "learned profession" exemption to the Sherman Act has not been determined conclusively by the Supreme Court; an analysis of this question must of necessity depend on the implications of several Supreme Court cases which approach without reaching this issue.

Limitations on the scope of the term "trade" originated with *The [Schooner] Nymph*, 18 F. Cas. 506, 507 (No. 10,388) (C.C.D. Me. 1834), in which Justice Story, concluding that fishing was a trade within the Coasting and Fishery Act of 1793, stated:

> "The argument for the claimant insists, that 'trade' is here used in its most restrictive sense, and as equivalent to traffic in goods, or buying and selling in commerce or exchange. But I am clearly of opinion, that such is not the true sense of the word, as used in the 32d. section. In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. *Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.* Thus, we constantly speak of the art, mystery, or trade of a housewright, a shipwright, a tailor, a blacksmith, and a shoe-maker, though some of these may be, and sometimes are, carried on without buying or selling goods . . . ." (Emphasis added)

The reference to "learned professions" is dictum since the case holds that fishing is within the scope of the term "trade."

In *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 436 (1932), the Supreme Court quoted the above passage with apparent approval in construing the scope of the "trade or commerce" clause in Section 3 of the Sherman Act, 15 U.S.C. §3. But there also the "learned profession" language is dictum since the Court held that a conspiracy to fix prices for cleaning, dyeing and renovating clothes was covered by the Sherman Act.

The Supreme Court again reproduced the Story quotation in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490-91 (1950), another Sherman Act Section 3 case. Once again the "learned profession" reference is dictum since the Court held that a conspiracy to fix real estate commissions was prohibited by the Sherman Act. The Court stated, 339 U.S. at 491-92:

> "The fixing of prices and other unreasonable restraints have been consistently condemned in case of services as well as goods . . . . Chief Justice Groner made an extended analysis and summary of the problem in United States v. American Medical Ass'n, 72 App. D.C. 12, 16-20, 110 F.2d 730, 707-711, where the Court of Appeals for the District of Columbia held that the practice of medicine in the District was a 'trade' within the meaning of §3 of the Act. Its conclusion was that the term included 'all occupations in which men are engaged for a livelihood.' *We do not intimate an opinion on the correctness of the application of the*

> *term to the professions.* We have said enough to indicate we would be contracting the scope of the concept of 'trade,' as used in the phrase 'restraint of trade,' in a precedent-breaking manner if we carved out an exemption for real estate brokers . . . ." (Emphasis added)

Significantly, the *Real Estate Boards* opinion does not cite *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 653 (1931) (dictum), where the Court stated that medical practitioners "follow a profession and not a trade." This *Raladam* dictum, then, presumably has little current import. Nor did the Court in *American Medical Association v. United States*, 317 U.S. 519, 528 (1943), refer to *Raladam.* Instead, the Court stated that it need not reach the question whether a physician's practice constitutes "trade" under Section 3 of the Sherman Act. Evidently, then, the Supreme Court does not feel that it has already carved out any "learned profession" exemption.

On the other hand, the Supreme Court does recognize that some competitive practices prevalent in the business world may not be acceptable for the profession. Thus, in *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952) (dictum), the Court stated:

> "We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608."

The cited *Semler* case dealt with state regulation of advertising by dentists, not with fee schedules. Even should fee schedules be invalidated under the Sherman Act, ethical considerations could still be sufficient to sustain prohibitions on solicitation and advertising.

The only other Supreme Court statements in this area are found in the series of sports cases beginning with *Federal Baseball Club v. National League*, 259 U.S. 200, 209 (1922), where the Court, in holding baseball exempt from the Sherman Act, stated that "personal effort, not related to production, is not a subject of commerce." This much criticized decision has never been extended to other professional sports, having been characterized by the Supreme Court itself as "an aberration." *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). *See also Haywood v. National Basketball Association*, 401 U.S. 1204 (1971); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club*, 348 U.S. 236 (1955).

Supreme Court cases thus leave open the question whether there is a "learned profession" exemption to the Sherman Act. It is instructive to examine decisions of other courts regarding this issue.

The only circuit court case dealing with the status of the legal profession itself under the Sherman Act is the above-discussed *Goldfarb* opinion. The district court in *Goldfarb* had declined to declare the existence of any "learned profession" exemption, stating, "Certainly fee setting is the least 'learned' part of the profession." *Goldfarb v. Virginia State Bar*, 355 F. Supp. 491, 495 (E.D. Va. 1973).

The Fourth Circuit, however, reversed this part of the district court decision, stating, 497 F.2d at 13:

> "Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of 'learned professions' from the scope of the antitrust laws. This exclusion is not a favor bestowed upon professionals by the courts as a 'professional courtesy'; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered."

The court bases its decision on two Supreme Court cases, *Federal Trade Commission v. Raladam Co., supra,* and *Federal Baseball Club v. National League, supra.* As we have already seen, the "learned profession" dicta in these two cases have no current vitality; *Goldfarb,* then, actually forges a new exemption to the Sherman Act.

The *Goldfarb* decision was based in large part on policy considerations. The court noted that the usual competitive forces do not operate in the realm of attorney-client relations. The court stated, 497 F.2d at 14:

> "The legal profession has rejected the maxim of *caveat emptor* as a standard of conduct. Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services. Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions." (footnotes omitted)

In addition, the defendant in the instant case cites several cases which stress the confidential and fiduciary relationship between attorney and client, and the duty of the profession to make legal services available even to those who cannot afford them.[5] It argues that, in light of the high standards and duties of the legal profession, the ordinary price competition for business has no place. The New York Court of Appeals accepted these arguments in its construction of the New York state antitrust statute, holding that judicial control over the profession, rather than antitrust law enforcement, was intended by the legislature. *Lincoln Rochester Trust Co. v. Freeman,* 34 N.Y.2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 (1974).

Defendant's policy arguments, of course, deserve serious consideration. There are indeed many factors which might convince a lawmaking body that the legal profession should not be subjected to all the rigor of the Sherman Act. However, the creation of exemptions to the Sherman Act is the province of Congress, not the courts. *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944); *see also United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). It is not for this court to create a new exemption to the Sherman Act for so-called "learned professions."

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5 *See, e.g., United States v. Dillon,* 346 F.2d 633 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966); *Barton v. State Bar of California,* 209 Cal. 677, 289 P. 818 (1930); *Sands v. Purcell,* 11 Or. App. 614, 504 P.2d 768 (1972).

Furthermore, the argument for exempting price-fixing activities of a "learned profession" is significantly weaker than the argument for exemption of other professional activities. Price-fixing is a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co., supra.* Most restraints of competition are subject to the "Rule of Reason," which calls for balancing the various harms and benefits occasioned to the public by the conduct in question. Thus, even though fee schedules are not immune from Sherman Act scrutiny, the professional bans on solicitation and advertising may still survive – if the public benefit from these ethical canons outweighs the competitive harm.

Several cases have indicated that a viable line might be drawn between the "commercial" and "noncommercial" activities of a profession, exempting only the latter from the Sherman Act. *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970); *Northern California Pharmaceutical Association v. United States*, 306 F.2d 379 (9th Cir. 1962), *cert. denied*, 371 U.S. 862 (1962).

In *Northern California Pharmaceutical Association, supra,* the Ninth Circuit considered and rejected defendants' argument that the "learned professional" status of pharmacists exempted their drug price-fixing agreement from the Sherman Act. The court stated, 306 F.2d at 385:

> "In short, it is in an area of 'entrepreneurial,' rather than professional activity, that appellants are charged with having run afoul of the Sherman Act.

And at 386 the court stated:

> "We do not decide that every action of professionals is within the reach of the Sherman Act. We do decide that an agreement among professionals to fix a commodity price is."

In *Marjorie Webster Junior College, supra,* the D.C. Circuit held that defendant's school accreditation activities were immune to antitrust law attack. The court stated, 432 F.2d at 654:

> "[T]he proscriptions of the Sherman Act were 'tailored * * * for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions." (footnotes omitted)

This adoption of a "commercial/noncommercial" activity dividing line is perhaps just an application of the "Rule of Reason." Be that as it may, there is no more commercial element to the practice of law than the setting of fees. Thus, even the acceptance by this Court of the exemption of noncommercial professional activities from the Sherman Act would not save defendant's fee schedules.

It is the conclusion of this Court that the fee schedule activities of the defendant, Oregon State Bar, are not immune to Sherman Act attack by either the "state action" doctrine or by the "learned profession" exemption. Accordingly, defendant's motion for summary judgment is DENIED.

DATED at Seattle, Washington, this 22d day of November, 1974.

/s/ Morell E. Sharp

UNITED STATES DISTRICT JUDGE